TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 61.

THE NORTHERN PACIFIC RAILWAY COMPANY, APPELLANT,

vs.

A. A. SODERBERG.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

(18,083.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 273.

THE NORTHERN PACIFIC RAILWAY COMPANY, APPELLANT,

vs.

J. A. SODERBERG.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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1 In the Circuit Court of the United States for the District of Washington, Northern Division. In Equity.

NORTHERN PACIFIC RAILWAY COMPANY, Complainant,
vs.
J. A. SODERBERG, Defendant.

Restraining Order.

Whereas, in the above-entitled cause, a motion for the issuance of a preliminary writ of injunction has been filed, and it appearing to the satisfaction of the court that there is danger of irreparable injury being caused to complainant before the said motion and application can be heard on notice, unless pending such hearing and the determination of said motion and application, defendant, his agents, servants, workmen, and employees, be temporarily restrained as herein set forth:

Therefore, complainant's application for such restraining order be, and it is hereby, set for hearing on the 26th day of October, 1898, upon the condition, however, that security is given, as required by law, in the sum of one thousand dollars, for making good
2 to the defendant, J. A. Soderberg, damages and costs that may be awarded them by reason of the granting of this order.

Now, therefore, take notice that you, J. A. Soderberg, your agents, servants, workmen, and employees, and each of you, upon the giving of such bond, are hereby specially restrained and enjoined from further quarrying, excavating, or removing any granite or other stone from the northeast quarter of section nineteen (19), in township twenty-seven (27) north, of range ten (10) east of the Willamette meridian, Washington; and from taking or removing, receiving, buying, selling, or disposing of any of the granite or other stone quarried thereon; and from authorizing others to take, receive, buy, sell, dispose of, or remove such granite or other stone, pending the hearing of said motion and application, which hearing be, and it is hereby, set for the 26th day of October, 1898, at Seattle, Washington, or as soon thereafter as the court can hear and determine the same, and until said motion and application shall be heard and determined, and until further order of the court herein, hereon, and in the premises.

Done in open court, while sitting as circuit judge, this 15th day of October, 1898.

C. H. HANFORD, *Judge.*

(Endorsed:) Restraining order. Filed Oct. 15, 1898. A. Reeves Ayres, clerk. A. N. Moore, dep.

3 In the United States Circuit Court for the District of Washington, Northern Division. In Equity.

NORTHERN PACIFIC RAILWAY COMPANY, Complainant,
vs.
J. A. SODERBERG, Defendant. } No. 719.

Order Modifying Restraining Order.

This court having heretofore, on the 15th day of October, 1898, made and entered an order restraining the defendant herein, his agents, servants, workmen, and employees, from quarrying, excavating or removing any granite or other stone on the northeast quarter of section 19, township 27 north, range 10 east, Willamette meridian, Washington, and from taking or removing, receiving, buying, selling, or disposing of any of the granite or other stone quarried thereon, and from authorizing others to take, re-
4 ceive, buy, sell, dispose of, or remove such granite or other stone pending the hearing of said motion and application set for the 26th day of October, 1898, in the above-entitled court, and it appearing to the court that the said defendant is quarrying stone and operating men upon a portion of the right of way of the Great Northern Railroad Company, running through said section 19, which said right of way at the place where said defendant is quarrying and taking out building stone, is of the width of one hundred feet from the center of the railroad track of the Great Northern railway, now, therefore, it is ordered, adjudged and decreed that the restraining order heretofore referred to be, and the same is hereby, modified, in that the same shall not in any way apply to or affect the defendant in the operation of any quarry or quarries situated upon the said right of way of the Great Northern Railroad Company, pending the hearing of the above-described restraining order, and that the said defendant may work said quarry upon the said right of way of the Great Northern Railway Company the same as if said restraining order had not been issued, until the further order of this court.

Done in open court this 21st day of October, 1898.

C. H. HANFORD, *Judge.*

(Endorsed:) Modification of restraining order. Filed Oct. 21, 1898. In the United States circuit court. A. Reeves Ayres, clerk. By H. M. Walthew, deputy.

In the United States Circuit Court for the District of Washington, Northern Division. In Equity.

NORTHERN PACIFIC RAILWAY COMPANY, Complainant,
vs.
J. A. SODERBERG, Defendant.
No. 719.

Order Granting Injunction.

The motion of complainant in the above-entitled case for an injunction during the pendency of said case, restraining the defendant and all persons acting under him from quarrying, excavating, and removing stone from the northeast quarter (N. E. ¼) of section nineteen (19), township twenty-seven (27) north of range ten (10) east of Willamette meridian, and from selling and disposing of any stone quarried and excavated on said property, coming on for hearing this day, and the motion of the above-named defendant to vacate and discharge the restraining order heretofore granted in the above-entitled case, restraining said defendant from doing any of the acts complained of in plaintiff's bill of complaint, coming on for hearing at the same time, and the court having heard
6 read the affidavits filed in the above-entitled case, and having heard the arguments of counsel for the respective parties, orders:

1st. That the application for said injunction be, and the same is hereby, denied as to any portion of said premises on the north side of the track of the Great Northern Railway Company within one hundred feet from the center of said track.

2d. That said application for an injunction as to the remaining portion of said premises be, and the same is hereby, granted so that the defendant and all persons acting under him be, and they are hereby, until the further order of this court, enjoined and restrained from quarrying, excavating, or removing any stone from said remaining portion of said premises to any greater extent than is necessary for a compliance with the regulations of the Land Department of the United States in regard to assessment-work, and as to any stone quarried, excavated, and removed in good faith for the purpose of complying with said regulations, said defendant is authorized to dispose of the same.

A writ of injunction in accordance with this order is hereby directed to be issued by the clerk of this court, to remain in force until this court shall otherwise order.

It is further ordered that upon the defendant filing in this court a bond in the sum of five thousand dollars, conditioned to pay all damages which this court may award to plaintiff for stone quarried, excavated, or removed from said above-described premises by de-

fendant or any one acting under him, which said bond shall
7 have two good and sufficient sureties approved by this court, then the injunction herein granted shall be dissolved.

Dated Seattle, October 28th, 1898.

C. H. HANFORD,
Judge of the District Court of the United States, Presiding in Circuit Court.

O K.
R. A. BALLINGER.

Copy of within order received this 27th day of Oct. 1898.
BALLINGER, RONALD & B.,
Att'ys for Def't.

(Endorsed:) Order. Filed Oct. 28, 1898. In the United States circuit court. A. Reeves Ayres, clerk. By H. M. Walthew, deputy.

Subpœna ad Respondendum.

UNITED STATES OF AMERICA:

Circuit Court of the United States, Ninth Judicial Circuit, District of Washington. In Equity.

The President of the United States of America to J. A. Soderberg, Greeting:

You are hereby commanded that you be and appear in said circuit court of the United States aforesaid, at the court-room in
8 Seattle on the 5th day of December, A. D. 1898, to answer a bill of complaint exhibited against you in said court by Northern Pacific Railway Company, who is a citizen of the State of Wisconsin, and to do and receive what the said court shall have considered in that behalf, and this you are not to omit, under the penalty of five thousand dollars.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, and the seal of said circuit court, this 19th day of October, in the year of our Lord one thousand eight hundred and ninety-eight, and of our Independence the 123d.

[Seal U. S. Circuit Court.]

A. REEVES AYRES, *Clerk*,
By H. M. WALTHEW,
Deputy Clerk.

Memorandum Pursuant to Rule 12, *Supreme Court U. S.*

You are hereby required to enter your appearance in the above suit on or before the first Monday of December next at the clerk's office of said court, pursuant to said bill; otherwise the said bill will be taken *pro confesso*.

A. REEVES AYRES, *Clerk*,
By H. M. WALTHEW,
Deputy Clerk.

9 No. 719.

UNITED STATES MARSHAL'S OFFICE,
DISTRICT OF WASHINGTON.

I hereby certify that I received the within writ on the nineteenth day of October, 1898, and personally served the same on the 19th day of Oct. 1898, by delivering to and leaving with the said J. A. Soderberg, at his residence in the city of Seattle, King Co., Washington, a true and correct copy of the within writ, together with a certified copy of a restraining order in said cause to said defendant named therein personally.

Oct. 19, 1898.

Marshal's Fees.

Service	4.00
Mileage	.12
	4.12

C. W. IDE, *U. S. Marshal,*
By JOHN WOODING, *Deputy.*

(Endorsed:) Subpœna. Filed Nov. 3, 1898. In the United States circuit court. A. Reeves Ayres, clerk. By H. M. Walthew, deputy.

10 In the Circuit Court of the United States for the District of Washington, Northern Division. In Equity.

NORTHERN PACIFIC RAILWAY COMPANY, Complainant,
vs.
J. A. SODERBERG, Defendant.

Amended Bill of Complaint.

To the honorable judges of the above-entitled court:

The Northern Pacific Railway Company, a corporation, organized, created, and existing under and by virtue of the laws of the State of Wisconsin, by leave of court first had and obtained, filed this, its amended bill of complaint, against J. A. Soderberg, a citizen and resident of the State of Washington, and thereupon your orator complains and says:

I.

That at all times hereinafter mentioned the Northern Pacific Railroad Company was a corporation, organized, created, and existing under and by virtue of an act of Congress, approved
11 July 2, 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget sound, on the Pacific coast, by the northern route," and the acts and joint resolutions of Congress supplemental thereto and amendatory thereof.

That, by the terms and provisions of said act, said corporation was authorized and empowered to lay out, locate, construct, furnish,

maintain, and enjoy a continuous railroad and telegraph line, with the appurtenances, beginning at a point on Lake Superior in the State of Minnesota, or Wisconsin, thence westerly by the most eligible railroad route as should be determined by said company, within the territory of the United States, on a line north of the forty-fifth degree of latitude, to some point on Puget sound, with a branch line, via the valley of the Columbia river, to a point at or near Portland, in the State of Oregon.

II.

That by the third section of said act lands were granted to the said railroad company as follows:

"That there be, and is hereby granted to the 'Northern Pacific Railroad Company,' its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast * * * every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said
12 railroad, whenever it passes through any State, and whenever on the line thereof the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road is definitely fixed and a plat thereof filed in the office of the Commissioner of the General Land Office, * * * provided, further, that all mineral lands be, and the same are hereby, excluded from the operations of this act and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands in odd-numbered sections, nearest to the line of said road, may be selected as above provided. And provided, further, that the word 'mineral,' when it occurs in this act, shall not be held to include iron or coal."

Section 4 of said act is in words and figures as follows, to wit:

"And be it further enacted, That whenever said 'Northern Pacific Railroad Company' shall have twenty-five consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated, the President of the United States shall appoint three commissioners to examine the same, and if it shall appear that twenty-five consecutive miles of said road and telegraph line have been completed in a good, substantial, and workmanlike manner, as in all other respects requireed by this act, the commissioners shall so report to the President of the United States, and patents of land as aforesaid shall be issued to said company, confirming to said company the right and title to said lands, situated opposite to and coterminous with said completed section of said road; and,
13 from time to time, whenever twenty-five additional consecutive miles shall have been constructed, completed, and in readiness as aforesaid, and verified by said commissioners to the President of the United States, then patents shall be issued to said company, conveying the additional sections of land, as aforesaid, and so

on as fast as every twenty-five miles of said road is completed as aforesaid."

And by the sixth section of said act Congress provided as follows:

"That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale or entry, or pre-emption before or after they are surveyed, except by said company as provided in this act; but the provisions of the act of September, 1841, granting pre-emption rights, and the acts amendatory thereof, and the act entitled 'An act to secure homesteads to actual settlers on the public doman,' approved May 20, 1862, shall be, and the same are hereby, extended to all other lands on the line of said road when surveyed, excepting those hereby granted to said company. And the reserved alternate sections shall not be sold by the Government at a price less than two dollars and fifty cents per acre when offered for sale."

And that the twelfth section of said act of Congress was and is in words and figures as follows:

"And be it further enacted, That the acceptance of the terms,
14 conditions, and impositions of this act by the Northern Pacific Railroad Company shall be signified in writing under the corporate seal of said company, duly executed pursuant to the direction of its board of directors first had and obtained, which acceptance shall be made within two years after the passage of this act, and not afterward, and shall be served on the President of the United States."

III.

That said railroad company accepted the terms, conditions, and impositions of said act of Congress in writing under its corporate seal, pursuant to the direction of its board of directors first had and obtained, and on the 29th day of December, A. D. 1864, served such acceptance on the President of the United States.

IV.

That by joint resolution approved May 31, 1870, entitled "A resolution authorizing the Northern Pacific Railroad Company to issue bonds for the construction of its road, and to secure the same by mortgage, and for other purposes," the Congress of the United States authorized the said railroad company to locate and construct under the provisions, and with the privileges, grants, and duties provided for in its act of incorporation, its main road to some point on Puget sound, via the valley of the Columbia river, with the right to locate and construct its branch from some convenient point on its trunk line across the Cascade mountains to Puget sound; which said resolution is in words and figures as follows, to wit:

"(No. 67.) A resolution authorizing the Northern Pacific
15 Railroad Company to issue its bonds for the construction of its road and to secure the same by mortgage, and for other purposes.

"Resolved, by the Senate and House of Representatives of the United States of America, in Congress assembled, That the Northern Pacific Railroad Company be, and hereby is, authorized to issue its bonds to aid in the construction and equipment of its road and to secure the same by mortgage on its property and rights of property of all kinds and descriptions, real, personal, and mixed, including its franchises as a corporation; and, as proof of its legal execution and effectual delivery, said mortgage shall be filed and recorded in the office of the Secretary of the Interior, and also to locate and construct under the provisions, and with the privileges, grants, and duties provided for in its act of incorporation, its main road to some point on Puget sound, via the valley of the Columbia river, with the right to construct its branch from some convenient point on its main trunk line across the Cascade mountains to Puget sound; and in the event of there not being in any State or Territory in which said main line or branch may be located at the time of the final location thereof, the amount of lands per mile granted by Congress to said company within the limits prescribed by its charter, then said company shall be entitled, under the directions of the Secretary of the Interior, to receive so many sections of land, belonging to the the United States and designated by odd numbers, in such State or Territory within ten miles on each side of the said road, beyond the limits prescribed in said charter, as will make up such deficiency on said line or branch, except mineral and
16 other lands as excepted in the charter of said company of 1864, to the amount of the lands that have been granted, sold, reserved, occupied by homestead settlers, pre empted or otherwise disposed of subsequent to the passage of the act of July two, eighteen hundred and sixty-four. And that twenty-five miles of said main line, between its western terminus and the city of Portland, in the State of Oregon, shall be completed by the first day of January, anno Domini, eighteen hundred and seventy-two, and forty miles of the remaining portion thereof each year thereafter until the whole shall be completed between said points; provided, that all lands hereby granted to said company which shall not be sold or disposed of, or remain subject to the mortgage by this act authorized, at the expiration of five years after the completion of the entire road, shall be subject to settlement and pre-emption like other lands, at a price to be paid to said company not exceeeding two dollars and fifty cents per acre, and if the mortgage hereby authorized shall, at any time, be enforced by foreclosure or other legal proceedings, or the mortgaged lands hereby granted, or any of them, be sold by the trustees to whom such mortgage may be executed, either at its maturity, or for any failure or default of said company under the terms thereof such lands shall be sold at public sale, at places within the States and Territories in which they shall be situate after not less than sixty days' previous notice, in single sec-

tions or subdivisions thereof, to the highest and best bidder; provided, further, that in the construction of the said railroad
17 American iron and steel only shall be used, the same to be manufactured from American ores exclusively.

"SEC. 2. And be it further resolved that Congress may, at any time, alter or amend this joint resolution, having due regards to the rights of said company, or any other parties.

"Approved May 31st, 1870."

V.

And your orator further shows that thereafter said Northern Pacific Railroad Company proceeded with the work of surveying and definitely locating the line of its branch railroad, extending from Pasco Junction, a point on the main line of said railroad, in the Territory (now State) of Washington, to Tacoma, in said Territory (now State) of Washington, and a point on Puget sound, and prior to March 26, 1884, had so surveyed and definitely located said branch railroad hereinafter, for the purpose of convenience, designated as the Cascade branch, extending coterminous with, and within forty miles of, the northeast quarter of section nineteen (19), township twenty-seven (27), north of range ten (10), east of the Willamette meridian, Washington and on the 26th day of March, 1884, filed a plat of said portion of the definite location of said Cascade branch, which said plat had been duly approved by the Secretary of the Interior, in the office of the Commissioner of the General Land Office.

And your orator further shows that at the date of the grant to said Northern Pacific Railroad Company, at the date of the joint resolution of May 31st, 1870, and at the time the line of said Cascade
18 branch of said Northern Pacific railroad, coterminous with said described land, was definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office, to wit, March 26th, 1884, said land was public land, to which the United States had full title, not reserved, sold, granted, or otherwise appropriated, and was free from pre-emption or other claims or rights, and said land was, and is, non-mineral in character.

And your orator further shows that after definitely fixing the line of said Cascade branch coterminous with said land, as aforesaid, the said Northern Pacific Railroad Company proceeded with the construction of its railroad and telegraph line on, over, and along said line of definite location, and having constructed a section of over twenty-five miles of said railroad and telegraph line, extending opposite to and coterminous with said land, the said company so reported to the President of the United States, and thereupon the President of the United States appointed three commissioners to examine said line of railroad and telegraph, and the said commissioners having examined said constructed portion of said railroad and telegraph line, extending opposite to and coterminous with the land hereinbefore described, duly reported that the same had been constructed in a good, substantial, and workmanlike manner, in all respects as required by said act of Congress, and thereupon, to wit, April 23, 1884, the President of the United States approved said re-

port, accepted said railroad and telegraph line, and directed that patents for the odd-numbered sections of public land, not mineral, coterminous therewith, should be issued, conveying the said
19 lands to said Northern Pacific Railroad Company, but no patent has yet issued for the premises hereinafter described.

And your orator further shows that by virtue of the definite location of said portion of the Cascade branch of the Northern Pacific railroad, and the construction, completion, and acceptance of said portion of said railroad and telegraph line, said Northern Pacific Railroad Company became, and until the 31st day of August, 1896, was the owner of said northeast quarter of section nineteen (19), township twenty-seven (27) north of range ten (10) east of the Willamette meridian, Washington, and thereafter was entitled to the exclusive possession of said premises.

VI.

That your orator, The Northern Pacific Railroad Company, is a corporation organized, created and existing under and by virtue of the laws of the State of Wisconsin, and is a citizen of the State of Wisconsin, and was not organized nor is it a corporation under the laws of the State of Washington.

VII.

That on or about the 31st day of August, 1896, your orator, said Northern Pacific Railway Company, by virtue of certain deeds of conveyance, duly signed, executed and delivered, became the successor in interest of said Northern Pacific Railroad Company, and became the owner of all property of whatsoever kind of said Northern Pacific Railroad Company, under and by virtue of the foreclosure sale and confirmation of sale in that certain action in the
20 above-named court, wherein The Farmers' Loan and Trust Company was complainant and The Northern Pacific Railroad Company *et al.* were defendants.

VIII.

That your orator, The Northern Pacific Railway Company, now is, and ever since the 31st day of August, 1896, has been continuously, operating said railroad as a common carrier for the purpose of transporting passengers, freight, and the United States mails, and prior to said date the N. P. R. R. Co. had continuously operated said road for said purposes from and after the construction of said road.

IX.

And your orator further shows that said northeast quarter of section nineteen (19), township and range aforesaid, is rough mountainous land, and its principal value consists in the existence thereon of a ledge of granite. That the granite upon said land is of a good and merchantable quality, and is subject to be quarried, and is of great value, to wit, of the value of $5,000.

And your orator further shows that the said defendant, J. A. Soderburg, on or about the — day of ——, 1898, entered upon said described land, and without any right, authority or permission from your orator so to do, and against the will of your orator, and without any right or authority whatsoever, and commenced to excavate, blast, quarry, and remove from said described land the granite therein, and to sell and dispose thereof, and has since continued daily so to quarry, excavate, and remove, sell, and dispose of said granite, and threatens to, and will, unless re-
21 strained by the order of this honorable court as your orator verily believes, continue so to quarry, excavate, and remove, sell, and dispose of the granite from said described land, and will thereby greatly impair the value of said land, and so commit irreparable injury thereto and to the interest of your orator therein. That as your orator is informed and believes, the said defendant, his agents, servants, workmen, and employees have so quarried, excavated, and removed from said described land, and shipped to the city of Spokane, over 8,000 lineal feet of granite, of the value of one dollar and ten cents ($1.10) per lineal foot in said city of Spokane. That said defendant, as your orator is informed and believes, is insolvent, financially irresponsible, and unable to respond for the injury done by such quarrying, excavating, and removal of said granite, and which will be done by the continued quarrying, excavating, and removal of said granite, and said described acts work irreparable injury to your orator, said Northern Pacific Railway Company.

X.

That defendant, as complainant is informed and believes, has made and filed what purports to be a mineral location of and upon the above-described premises, and claims them as such, for the granite thereon, which granite may be used for building purposes, and by reason of there being granite or building stone on said premises, and the purported locations thereof as alleged mineral claims by defendant, defendant asserts that said premises are excepted from the said act of June 2, 1864, and the said grant to the Northern Pacific Railroad Company, and acts and resolutions
22 amendatory thereof and supplemental thereto, and the question of whether said premises are mineral or non-mineral has not yet been determined by the Land Department of the United States.

XI.

That defendant was, at the time of filing the original bill, and for a long time prior thereto had been, and ever since said date has been a resident and citizen of the State of Washington.

Forasmuch as your orator can have no adequate relief except in this court, and to the end, therefore, that it may obtain the relief to which it is justly entitled in the premises, your orator now prays the court to grant it a writ of subpœna of the United States of America, directed to said defendant, J. A. Soderberg, hereinbefore named, requiring and commanding him to appear herein and

answer, but not under oath, an answer under oath being hereby expressly waived, the several allegations in this, your orator's bill of complaint, contained.

And your orator further prays that your honors may grant a writ of injunction, issuing out of and under the seal of this honorable court, perpetually enjoining and restraining the said defendant, his agents, servants, workmen, and employees, from further quarrying, excavating, and removing any granite or other stone from said northeast quarter of section nineteen (19), township twenty-seven (27) north of range ten (10) east of the Willamette meridian, Washington; and from taking or removing, buying, selling, or disposing of any of the granite or other stone so quarried therein; and from authorizing others to take, receive, buy, sell, remove or dispose of such granite or other stone.

23 And your orator further prays that a provisional or preliminary order may issue, restraining said defendant, his agents, servants, workmen, and employees from further quarrying, excavating and removing any granite or other stone from said described land, and from taking, receiving, buying, selling or disposing of any of the granite or other stone quarried thereon or removed therefrom, and from authorizing others so to take, receive, buy, sell, dispose of, or remove such granite or other stone, pending the final decree herein.

And your orator further prays that said defendant may be ordered and decreed to account to your orator for any and all granite or other stone which he, his agents, servants, workmen, and employees, may have quarried and removed from said land, or any thereof, and to pay unto your orator the value of the granite or other stone so quarried or removed.

And your orator prays that it may have such other and further relief as the equity of the case may require, and to your honors may seem meet.

STEPHENS & BUNN,
Solicitors for Complainant.

STATE OF WASHINGTON, } ss:
County of Spokane, }

F. D. Gibbs, being first duly sworn, upon oath deposes and says: That he is an officer of The Northern Pacific Railway Company, a corporation, the complainant in the above-entitled action, to wit, its general agent, at the city of Spokane, in the State of Wash-
24 ington, and makes this verification for and on behalf of said complainant; that he has read the above and foregoing bill of complaint, and knows the contents thereof; and that the same is true, as he verily believes.

F. D. GIBBS.

Subscribed and sworn to before me this 3d day of January, 1899.
[NOTARIAL SEAL.] E. T. WHITE,
Notary Public in and for the State of Washington,
Residing at Spokane, Washington.

Due service of within amended bill by receipt of a true copy thereof admitted this 6th day of January, 1899.

BALLINGER, RONALD & BATTLE,
Sol's for Defendant.

(Endorsed:) Amended bill of complaint. Filed Jan. 6, 1899. A. Reeves Ayres, clerk. H. M. Walthew, deputy.

25 In the Circuit Court of the United States for the District of Washington, Northern Division. In Equity.

NORTHERN PACIFIC RAILWAY COMPANY, Complainant,
vs.
J. A. SODERBERG, Defendant. } No. 719.

Amended Answer to Amended Bill of Complaint.

To the honorable judges of the above-entitled Court:

This defendant, saving and reserving unto himself the benefit of all exceptions to the errors and imperfections in said amended bill contained, for answer to so much thereof as he is advised it is necessary or material for him to answer unto, does aver and say:

I.

That he admits the allegations of paragraphs one, two, three, and four of said bill of complaint.

II.

Defendant further admits that thereafter the said Northern Pacific Railroad Company proceeded with the work of surveying and
26 locating the line of its branch railroad, extending from Pasco Junction to Tacoma, but as to whether said Northern Pacific Railroad Company, prior to March 26, 1884, had so surveyed and definitely located said Cascade branch, extending coterminous with and within forty miles of, the northeast quarter of section nineteen (19), township twenty-seven (27) north, of range ten (10) east of the Willamette meridian, Washington, and as to whether, on the 26th day of March, 1884, said railroad company filed a plat of said portion of the definite location of said Cascade branch, and as to whether said plat had been duly approved by the Secretary of the Interior, this defendant has no knowledge or information sufficient to form a belief, and therefore demands the proof of the same; and defendant further admits that the lands and premises described in the bill of complaint were at the date of the grant to said Northern Pacific Railroad Company, and at the date of joint resolution of May 31, 1870, and on March 26, 1884, were public lands to which the United States had full title, but denies that said lands were not reserved or otherwise appropriated, and that they were free from pre-emption or other claims or rights, but avers the truth to be that they were reserved and otherwise appropriated, and were not free from pre-emption or other claims or rights, and denies that said land was

and is non-mineral in character, but avers the truth to be that said land was at all of said time, and still is, mineral in character, and as such was by the terms of said grant to said Northern Pacific Railroad Company reserved and otherwise appropriated from said grant, and defendant further admits that after definitely fixing the line of said Cascade branch
27 coterminous with the lands aforesaid, the said Northern Pacific Railroad Company proceeded with the construction of its railroad and telegraph lines on, over and along said line of location, and having constructed a section of over twenty-five miles of said railroad and telegraph lines, extending opposite to and coterminous with the land described in said bill of complaint, the said company so reported to the President of the United States, and thereupon the President of the United States appointed three commissioners to examine said line of railroad and telegraph, and admits that said commissioners, having examined said constructed portion of said railroad and telegraph line, reported that the same had been constructed in a good, substantial and workmanlike manner, but as to whether on the 23d day of April, 1884, or at all, the President of the United States approved said report, accepted said raiload and telegraph line, and directed that patents for the odd-numbered sections of public lands not mineral, coterminous therewith, should be issued conveying said lands to said Northern Pacific Railroad Company, this defendant has no knowledge or information sufficient to form a belief, and demands proof of the same; and defendant further admits that no patent has as yet issued for any of the premises mentioned in the bill of complaint herein, and defendant further denies that by virtue of the definite location of said portion of the Cascade branch of the Northern Pacific railroad, and the construction, completion, and aceptance of said portion of said railroad and said telegraph line, said Northern Pacific Railroad Company became the owner, or that until the 31st
28 day of August, 1896, it remained the owner of the northeast quarter of section nineteen (19), township twenty-seven (27) north, of range ten (10) east of the Willamette meridian, Washington, or any part thereof, and denies that said railroad company thereafter was entitled to the possession at all of the same.

III.

That defendant admits paragraph six of said bill of complaint.

IV.

Defendant admits that on or about the 31st day of August, 1896, the complainant herein, said Northern Pacific Railway Company, by virtue of certain deed of conveyance, became the successor in interest of the Northern Pacific Railroad Company, and became the owner of the property of the said Northern Pacific Railroad Company, under and by virtue of a foreclosure sale and confirmation mentioned in paragraph seven of said bill of complaint, but denies that at said time the said Northern Pacific Railroad Company owned, or that by said conveyance or foreclosure conveyed to, or

that any portion of the said northeast quarter of section nineteen (19), township twenty-seven (27) north, of range ten (10) east, passed to or became the property of the said Northern Pacific Railway Company.

V.

Defendant admits the allegations of paragraph eight of said bill of complaint.

VI.

The defendant further admits that the said northeast quar-
29 ter of section nineteen (19), township and range aforesaid is rough, mountainous land, and its principal and only value consists in the existence thereon of a ledge of granite; that the granite upon said land is of a good and merchantable quality, and is subject to be quarried, and is of great value, and defendant further admits that he entered upon said described land, but alleges the date of entry to be long prior to the date mentioned in the bill of complaint of the complainant, but denies that said entry was without right or authority, and admits that he commenced to excavate, blast, quarry, and remove from said described land the granite thereon, and to sell and dispose thereof, and admits that he has since continued daily so to quarry, excavate, and remove, sell, and dispose of said granite, at such times when an opportunity to sell said granite presented itself, but denies that any acts of his are an injury to the interest of the complainant in said land, and denies that said complainant has any interest in said land, but admits that he has, through himself, and his agents, and servants, and workmen, quarried, excavated, and removed from said land over eight thousand lineal feet of granite, but denies the value of the same to be over 10c. per lineal foot, but denies that he is insolvent or financially irresponsible, or unable to respond for any injury which may have been done by such quarrying, excavating, and removing, and denies that any injury has been done to the said land or to the said complainant, and denies that the said complainant has any interest whatever in said property.

VII.

Defendant admits that he has made and filed a mineral
30 location of and upon a certain portion of the premises hereinafter described, and that he claims said portion for the granite thereon, which granite may be used for building purposes, and defendant admits that he asserts that said premises are excepted from the grant to the Northern Pacific Railroad Company, but defendant denies that the question whether said premises are mineral or non-mineral has not yet been determined by the Land Department of the United States, but avers the truth to be that the same has been determined, and that it has been determined that the said lands are mineral lands.

VIII.

Defendant admits the allegations of paragraph eleven of said bill of complaint.

And for a further and affirmative defense and cross-complaint and counter-claim, this defendant alleges:

I.

That at all times prior to and on the 14th day of April, 1897, the lands described in the bill of complaint herein as the northeast quarter of section nineteen (19), township twenty-seven (27) north of range ten (10) east of the Willamette meridian, Washington, were unsurveyed and unoccupied public lands of the United States, and were mineral lands and valuable only for the granite or building stone thereon, and were free and open to exploration and purchase, and subject to entry and claim under the mining laws of the United States.

II.

That on said 14th day of April, 1897, this defendant, John
31 A. Soderberg, being then and there a citizen of the United States, and being then in all respects qualified to enter mineral land under the laws of the United States, did then and there, in accordance with the said mining laws of the United States, and the regulations and rules of the mining district in which said lands were situated, enter upon that certain portion of said lands described in the bill of complaint herein, hereinafter described, and locate thereon under the laws and rules applicable to and governing the location and entry of placer claims, two certain mining or mineral claims, as follows, to wit: The Lillie, containing 11.401 acres, and the Linea, containing 12,865 acres, said claims being adjacent claims, and being hereinafter more particularly described, and which said locations were, and each of them was, distinctly marked on the ground, so that its boundaries could be readily traced, and thereafter on, to wit, the 16th day of April, 1897, this defendant did duly cause a record of said locations and said mining claims to be entered upon the public records of said mining district, and of the county of Snohomish, the same being the county in which said lands and claims were situated, as required by the laws of the United States and the State of Washington, and the local rules and regulations of said mining district, which said records, and each of them, contained the name of this defendant as locator, with the date of said location, together with such description of the claims located, by reference to some natural object or permanent monument, as to enable said claims to be identified.

32 III.

That having located said claims, and having recorded the same as aforesaid, the defendant entered upon the development of the same, and between said location and the date of application for patent hereinafter mentioned, continued thereon in person, and with a

large number of laborers and with expensive machinery, and expended in labor and improvements upon and in developing each of said claims a sum of money in excess of five hundred ($500.00) dollars.

IV.

That thereafter on, to wit, the 5th day of October, 1898, this defendant did, in due form, file in the land office in Seattle, Washington, the same being the land office in the district in which said claims were located, an application to purchase said Lillie and said Linea mining claims as such mineral lands and as such adjacent claims, and did then and there make oath before the register and receiver of said land office and file the same in said land office, showing the compliance by defendant with the mining laws of the United States, together with a plat and field-notes of the claims, made under the direction of the United States surveyor general for Washington, showing accurately the boundaries of the claims, and of each of them, which were distinctly marked by monuments on the ground, and showing further that said claims would fall within the boundaries of the northeast quarter of section nineteen (19), in township twenty-seven (27) north of range ten (10) east of the Willamette meridian, when the public survey should be ex-
33 tended over them, and did then and there, previous to filing said application, post in a conspicuous place on the claims embraced therein a copy of such plat, together with a notice of such application for patent, which said plat and notice did then and there remain conspicuously posted on said premises during the period of publication hereinafter mentioned, and did then and there file in said land office with his application an affidavit of two persons that such plat and notice had been duly posted, and likewise filed at said time and in said land office a copy of said notice so posted, and by said application he requested to be permitted to purchase said claims as mineral land, and he then and there undertook and offered to maintain by proof that the said claims were valuable only for the granite and building stone contained therein and thereon, and were mineral lands of the United States to which he was entitled under the laws thereof, and that he had done the requisite amount of work in labor and improvements thereon, to wit, work on each claim of the value of over seven hundred ($700.00) dollars, and was entitled to a patent therefor. That said application and affidavit and notice and plat and field-notes being filed as aforesaid, and being then and there entered of record in said United States land office by the register and receiver thereof, said application was duly set for hearing, and notice of said application and hearing in due form of law was given and published by the register for the period of sixty days in the proper newspaper, to wit, in the newspaper published nearest to the claims designated for the purpose, and said register did also post such notice in his office for the same period, which said entry, application, affidavit, notice, plat and
34 field-notes were in all respects formal according to law, and this defendant, as claimant, did further, at the time of filing

his application, file with the register of the said land office a certificate of the United States surveyor general that over five hundred (500.00) dollars' worth of labor had been expended or improvements made upon each of said claims by this claimant, and that said plat so filed was correct, with such further description, by reference to natural objects or permanent monuments, as should identify the claims or each of them, and furnish an accurate description to be incorporated in the patent; and at the expiration of the said sixty days of publication, this defendant, the claimant therein, did file in said land office his affidavit showing that the plat and notice aforesaid had been posted in a conspicuous place on the claims, and had remained and been kept so posted during said period of publication.

V.

That no adverse claim and no protest was filed with the register and receiver of said land office at the expiration of said sixty days of publication, or before said time or at all, by the complainant herein or by any other person, although said complainant had special notice of the pendency of the application of this defendant in said matter.

VI.

That this defendant, having complied with all the rules and regulations of the Land Department and of the mining laws of the United States in this behalf, and having made his proof as hereinbefore alleged, it was assumed and decided by the Land Department
35 of the United States that this defendant, the applicant therein, was entitled to a patent upon the payment of the proper fee and the price per acre for said land, and that no adverse claim existed; whereupon, this defendant, the claimant therein, duly paid all of the fees required in said land office, and duly paid the price per acre for said lands, and received, on the 20th day of December 1898, from said land office, the receiver's receipt, showing said sum to be in payment in full for the area embraced in the mining claims known as the Lillie and Linea above mentioned, and said proof and records were duly transmitted to the Land Department of the United States, Washington, D. C., with recommendation that patent be issued in due form to the claimant, this defendant, for said lands.

VII.

That the claims entered, purchased, and claimed by this defendant as such mineral lands, are described as follows, to wit:

Description of "Linea."

Beginning at corner No. 1, whence the corner common to sections 13 and 24, township 27 north, range 9 east, Willamette meridian, and sections 18 and 19, township 27 north, range 10 east, Willamette meridian, bears north 77 degs. 59 mins. west, 2,438.80 feet, and the corner common to sections 17, 18, 19, and 20, township 27

north, range 10 east, Willamette meridian, bears north 80 degs. 19½ mins. east, 2,981.80 feet; running thence north 73 degs. 20 mins. east, variation 22 degs. 50 mins. east, 600 feet, to corner No. 2, whence Index mountain bears south 9 degs. 58 mins. west;
36 thence running south 12 degs. 38 mins. east, variation 23 degs. 15 mins. east, 1,038 feet. to corner No. 3, whence the right bank of the north fork of the Skykomish river bears south 12 degs. 38 mins. east, 35 feet; thence south 73 degs. 20 mins. west, variation 23 degs. 12 mins. east, 600 feet to corner No. 4, whence the right bank of the Skykomish river bears south 40 degs. east, 79 feet; thence north 12 degs. 38 mins. west, variation 23 degs. 0 mins. east, 1,038 feet, to corner No. 1, the place of beginning.

Description of "Lillie."

Beginning at corner No. 1, which is identical with corner No. 2 of the Linea claim hereinbefore described, and from which the corner common to sections 13 and 24, township 27 north, range 9 east, Willamette meridian, and sections 18 and 19, township 27 north, range 10 east, Willamette meridian, bears north 83 degs. 31¾ mins. west, 2,979.10 feet, and the corner common to sections 17, 18, 19, and 20, township 27 north, range 10 east, Willamette meridian, bears north 82.04½ mins. east, 2,387.40 feet, running thence south 76 degs. 34 mins. east, variation 23 degs. 15 mins. east, 600 feet to corner No. 2; thence running south 12 degs. 38 mins. east, variation 22 degs. 30 mins. east, 1,038 feet, to corner No. 3, whence Mt. Index bears south 14 degs. 26 mins. west, and the right bank of Skykomish river bears south 34 feet; thence north 76 degs. 34 mins. west, variation 23 degs. 10 mins. east, 600 feet, to corner No. 4, being identical with corner No. 3 of the Linea claim, hereinbefore described; thence north 12 degs. 38 mins. west, along the east line of the Linea, the same being the west line of the Lillie claim, 1,038 feet, to corner No. 1, place of beginning.

37 These claims will form a portion of the north half of section 19, township 27 north, range 10 east, Willamette meridian, when said township shall have been surveyed.

VIII.

That by reason of the premises herein, this defendant is now the owner of said portion of the lands described in the bill of complaint herein, as is described and set forth herein as the Lillie and Linea mining claims.

Second Affirmative Defense.

This defendant further, not confessing all or any of the matters in said bill of complaint to be true as therein alleged, for a second plea to said bill, by way of further defense, cross-complaint, and counterclaim, avers and says:

I.

That by an act of Congress, entitled "An act for the sale of timber lands in the States of California, Oregon, Nevada, and in Washington Territory," approved June 3, 1878, and long prior to the date of the filing of the definite location of the line of railway of the complainant herein, Congress reserved from the grant of lands to said Northern Pacific Railroad Company, and otherwise appropriated, all lands in the States and in said Washington Territory, mentioned in said title, valuable chiefly for stone.

II.

That by said act of Congress aforesaid all of the lands within the limits of the grant to the said Northern Pacific Railroad
38 Company, valuable chiefly for stone, including the lands described in this defendant's first affirmative defense and cross-complaint herein, were withdrawn from said grant and otherwise appropriated, and the same were not included in the grant of lands passing to said railroad company at the date of definite location of the line of their railroad aforesaid.

Wherefore, the defendant prays that the complainant take nothing by its complaint herein, and that defendant be decreed to be the owner of said Lillie and Linea mining claims, and that title thereto be confirmed in him, and the same be quieted, and for such other and further relief as to the court may seem meet and equitable in the premises.

BALLINGER, RONALD & BATTLE,
Attorneys for Defendant.

UNITED STATES OF AMERICA, } ss:
District of Washington, }

J. T. Ronald, being first duly sworn, on oath says: That he is one of the attorneys for the defendant in the above-entitled action; that he has heard the foregoing amended answer read, knows the contents thereof, and believes the same to be true; that he makes this affidavit because defendant is a non-resident of the county of King, and is not now within said county of King to make this verification in his own behalf.

J. T. RONALD.

Subscribed and sworn to before me this 19th day of Sept., A. D. 1899.

[NOTARIAL SEAL.] A. J. TENNANT,
Notary Public in and for Washington,
Residing at Seattle.

39 (Endorsed:) Amended answer to amended bill of complaint. Filed in the United States circuit court, district of Washington, Sep. 30, 1899. A. Reeves Ayres, clerk. H. M. Walthew, dep.

In the Circuit Court of the United States for the District of Washington, Northern Division, Holding Terms at Seattle, Washington. In Equity.

NORTHERN PACIFIC RAILWAY COMPANY, Complainant,
vs.
J. A. SODERBERG, Defendant.

Replication.

The complainant, The Northern Pacific Railway Company, for replication to the answer of the defendant, J. A. Soderberg, to the amended bill herein, says and alleges:

This replicant, saving and reserving to itself all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties, and insufficiencies of the answer of said defendant, for replication thereunto saith, that it doth and will aver, maintain, and prove its said amended bill to be true, certain, and sufficient in the law to be answered unto by said defend-
40 ant, and that the answer of said defendant is very uncertain, evasive, and insufficient in the law to be replied unto by this replicant, and that the said answer is untrue; all which matters and things this replicant is ready to aver, maintain, and prove as this honorable court may direct, and humbly prays as in and by its amended bill it hath already prayed.

STEPHENS & BUNN,
Solicitors for Complainant.

STATE OF WASHINGTON, } ss:
County of Spokane, }

Jno. W. Hill, being first duly sworn, upon oath deposes and says: That he is general agent of The Northern Pacific Railway Company, complainant in the above-entitled suit, located and residing at Spokane, Washington, and makes this verification and affidavit for and on behalf of said complainant; that he has read the above and foregoing replication and knows the contents thereof, and that the same is true as he verily believes.

JNO. W. HILL.

Subscribed and sworn to before me this 27th day of September, 1899.

[NOTARIAL SEAL.] E. T. WHITE,
Notary Public in and for the State of Washington,
Residing at Spokane, Washington.

(Endorsed:) Replication. Filed Sep. 30, 1899. A. Reeves Ayres, clerk. A. N. Moore, dep.

41 In the Circuit Court of the United States for the District of Washington, Northern Division, Holding Terms at Seattle, Washington. In Equity.

NORTHERN PACIFIC RAILWAY COMPANY, Complainant,
vs.
J. A. SODERBERG, Defendant.
} No. 719.

Answer to Affirmative Defense.

Answering the cross-complaint and counter-claim attempted to be set forth and pleaded in the answer of defendant herein, comes now the complainant, The Northern Pacific Railway Company, and, saving and reserving unto itself the benefit of all exceptions to the errors and imperfections in said alleged cross-complaint and counter-claim contained or pleaded in the answer of defendant herein, for answer to so much thereof as it is advised it is necessary and material for it to answer unto, doth aver and say:

1. It denies that on April 14th, 1897, or at all times prior to the 14th day of April, 1897, or any time prior thereto after July 2, 1864, the lands described in the bill of complaint herein as the north-
42 east quarter of section nineteen (19), township twenty-seven (27) north of range ten (10) east of the Willamette meridian, Washington, were unsurveyed and unoccupied lands of the United States, or were mineral lands valuable only for the granite and building stone thereon, and denies that said premises, or any part thereof, were free or open to exploration or purchase or subject to entry or claim under the mining laws of the United States, or any law or laws of the United States, except under the act of Congress granting lands to the Northern Pacific Railroad Company.

2. Complainant denies that defendant, on April 14, 1897, or at any other time or date, did enter, in accordance with the mining laws of the United States and the rules and regulations of the mining district in which the lands were situated, or otherwise, or at all, upon, or locate thereon, under the laws and rules applicable to and governing the location and entry of placer claims, two certain mineral or mining claims described in paragraph two of the alleged counter-claim, or any mineral claim whatever. Complainant admits that a record of alleged entries was made as alleged in paragraph two of said cross-bill and counter-claim, but denies that said record, or any part thereof, was authorized or permitted by law, and in this connection alleges that said lands were not subject to location or appropriation as placer mineral claims, or otherwise, or at all, as mineral lands, and in this connection complainant alleges that said lands were granted to the Northern Pacific Railroad Company, of which complainant is successor, by act of July 2, 1864, and the subsequent matters and
43 things as set forth and alleged in the amended bill of complaint of complainant herein.

3. Complainant denies that defendant has put upon said premises, or any part thereof, expensive machinery, and denies that said

property, or any part thereof, has been improved by work upon or development of the same as alleged mineral claims.

4. Complainant denies that it had any special or other notice of the proceedings alleged to have been taken by defendant in the United States Land Office, or elsewhere, upon application for patent, and alleges in this connection that the land described in the amended bill of complaint herein was not subject to appropriation as mineral land, and, therefore, all the acts of the defendant and all the proceedings had with reference to obtaining patent and attempted mineral location and appropriation of said land, or any part thereof, were, and are, and each of them is, without effect, and null and void. And, therefore, denies that defendant, by affidavit or otherwise, shows compliance with the mining laws or law of the United States, or any part of such law.

5. Complainant denies that, by reason of the matters and things alleged in the alleged cross-bill and counter-claim of defendant, or for any other reason, or any other account, or otherwise, or at all, defendant is now, or ever has been, the owner of that portion of the lands described in the amended bill of complaint herein, mentioned and described in paragraph seven of said alleged cross-bill and counter-claim as mineral claims, or any part thereof, or of either of them.

44 And having thus fully made answer to said alleged cross-bill and counter-claim, complainant prays that defendant have and take nothing thereby or thereunder, and that complainant be dismissed with its costs, and further prays relief as in its amended bill set forth and prayed.

STEPHENS & BUNN,
Solicitors for Complainant.

STATE OF WASHINGTON, }
County of Spokane, } *ss:*

Jno. W. Hill, being first duly sworn, upon oath deposes and says: That he is general agent of The Northern Pacific Railway Company, complainent in the above-entitled suit, located and residing at Spokane, Washington, and makes this affidavit and verification for and on behalf of said complainant; that he has read the above and foregoing answer to affirmative defense and knows the contents thereof; and that the same is true, as he verily believes.

JNO. W. HILL.

Subscribed and sworn to before me this 27th day of September, 1899.

[NOTARIAL SEAL.] E. T. WHITE,
Notary Public in and for the State of Washington,
Residing at Spokane, Washington.

(Endorsed:) Anwer to affirmative defense. Filed Sept. 30, 1899. A. Reeves Ayres, clerk. A. N. Moore, deputy.

45 In the Circuit Court of the United States in and for the Ninth Judicial Circuit, District of Washington, Northern Division.

NORTHERN PACIFIC RAILWAY COMPANY, Complainant,
vs.
J. A. SODERBERG, Defendant.

Stipulation as to Facts.

It is hereby agreed that the above-entitled action may be, and is hereby, submitted upon the merits, upon the following agreed facts:

I.

That at all times hereinafter mentioned the Northern Pacific Railroad Company was a corporation created, organized, and existing under and by virtue of an act of Congress, approved July 2, 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget sound, on the Pacific coast by the northern route," and the acts and joint resolutions of Congress supplemental thereto and amendatory thereof.

That, by the terms and provisions of said act, said corporation was authorized and empowered to lay out, locate, construct,
46 furnish, maintain, and enjoy a continuous railroad and telegraph line, with the appurtenances, beginning at a point on Lake Superior, in the State of Minnesota or Wisconsin, thence westerly by the most eligible railroad route, as should be determined by said company, within the Territory of the United States, on a line north of the forty-fifth degree of latitute, to some point on Puget sound, with a branch line, via the valley of the Columbia river, to a point at or near Portland, in the State of Oregon.

II.

That by the third section of said act of Congress there was granted to the said Northern Pacific Railroad Company, to aid in the construction of its railroad and telegraph line provided for in said act, the following lands:

"And be it further enacted That there be, and hereby is, granted to the Northern Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption, or

other claims or rights, at the time the line of said road is definitely fixed and a plat thereof filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections; provided, that if said route shall be found upon the line of any other railroad route to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act; provided, further, that the railroad company receiving the previous grant of land may assign their interest to the said Northern Pacific Railroad Company, or may consolidate, confederate and associate with said company upon the terms made in the first section of this act; provided, further, that all mineral lands be, and the same are hereby, excluded from the operation of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands, in odd-numbered sections, nearest to the line of said road may be selected as above provided; and provided, further, that the word 'mineral,' when it occurs in this act, shall not be held to include iron or coal; and provided, further, that no money shall be drawn from the Treasury of the United States to aid in the construction of the said Northern Pacific railroad."

47

48 Section four (4) of said act is in the words and figures as follows to wit:

"And be it further enacted, That whenever said Northern Pacific Railroad Company shall have twenty-five consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated, the President of the United States shall appoint three commissioners to examine the same, and if it shall appear that twenty-five consecutive miles of said road and telegraph line have been completed in a good, substantial, and workmanlike manner, as in all other respects required by this act, the commissioners shall so report to the President of the United States, and patents of lands, as aforesaid, shall be issued to said company, confirming to said company the right and title to said land situated opposite to, and coterminous with, said completed section of said road; and, from time to time, whenever twenty-five additional consecutive miles shall have been constructed, completed, and in readiness as aforesaid, and verified by said commissioners to the President of the United States, then patents shall be issued to said company conveying the additional sections of land as aforesaid, and so on as fast as every twenty-five miles of said road is completed as aforesaid; provided, that not more than ten sections of land per mile, as said road shall be completed, shall be conveyed to said company for all that part of said railroad lying east of the western boundary of the State of Minnesota, until the whole of said railroad shall be finished and in good

running order as a first-class railroad from the place of beginning, on Lake Superior, to the western boundary of Minnesota;
49 provided, also that lands shall not be granted under the provisions of this act on account of any railroad, or part thereof, constructed at the date of the passage of this act."

Section six (6) of said act is in the words and figures following, to wit:

"And be it further enacted, That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of the said railroad; and the odd sections of land hereby granted shall not be liable to sale, or entry, or pre-emption before or after they are surveyed, except by said company, as provided in this act; but the provisions of the act of September, eighteen hundred and forty-one, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled 'An act to secure homesteads to actual settlers on the public domain,' approved May twenty, eighteen hundred and sixty-two, shall be, and the same are hereby extended to all other lands on the line of said road, when surveyed, excepting those hereby granted to said company. And the reserved alternate sections shall not be sold by the Government at a price less than two dollars and fifty cents per acre when offered for sale."

And that the twelfth section of said act is in the words and figures following, to wit:

"And be it further enacted, That the acceptance of the terms, conditions, and impositions of this act by the said Northern Pacific Railroad Company shall be signified in writing under the corpo-
50 rate seal of said company, duly executed pursuant to the direction of its board of directors first had and obtained, which acceptance shall be made within two years after the passage of this act, and not afterward, and shall be served on the President of the United States."

And the twentieth section of said act is in words and figures as follows, to wit:

"And be it further enacted, That the better to accomplish the object of this act, namely, to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the Government at all times (but particularly in time of war) the use and benefits of the same for postal, military and other purposes, Congress may, at any time, having due regard for the rights of said Northern Pacific Railroad Company, add to, alter, amend, or repeal this act."

III.

That the said railway company accepted the terms, conditions, and impositions of said act of Congress in writing under its corporate seal, pursuant to the direction of its board of directors first had and obtained, and on the 29th day of December, A. D. 1864, served such acceptance on the President of the United States.

IV.

That, by joint resolution, approved May 31, 1870, entitled "A resolution authorizing the Northern Pacific Railroad Company to issue bonds for the construction of its road and to secure the same by mortgage, and for other purposes," the Congress of the United
51 States authorized the said railroad company to locate and construct, under the provisions and with the privileges, grants, and duties provided for in its act of incorporation, its main road to some point on Puget sound, via the valley of the Columbia river, with the right to locate and construct its branch from some convenient point on its main trunk line across the Cascade mountains to Puget sound; which said resolution is in words and figures as follows, to wit:

"(No. 67.) A resolution authorizing the Northern Pacific Railroad Company to issue its bonds for the construction of its road and to secure the same by mortgage, and for other purposes.

"Resolved, by the Senate and House of Representatives of the United States of America in Congress assembled, That the Northern Pacific Railroad Company be, and hereby is, authorized to issue its bonds to aid in the construction and equipment of its road, and to secure the same by mortgage on its property and rights of property of all kinds and descriptions, real, personal, and mixed, including its franchise as a corporation; and, as proof and notice of its legal execution and effectual delivery, said mortgage shall be filed and recorded in the office of the Secretary of the Interior; and also to locate, and construct under the provisions and with the privileges, grants, and duties provided for in its act of incorporation, its main road to some point on Puget sound, via the valley of the Columbia river, with the right to locate and construct its branch from some convenient point on its main trunk line across the Cascade mountains to Puget sound; and in the event of there not being in any
52 State or Territory in which said main line or branch may be located, at the time of the final location thereof the amount of lands per mile granted by Congress to said company, within the limits prescribed by its charter, then said company shall be entitled under the direction of the Secretary of the Interior to receive so many sections of land belonging to the United States, and designated by odd numbers, in such State of Territory, within ten miles on each side of said road beyond the limits prescribed in said charter, as will make up such deficiency on said main line or branch, except mineral and other lands as excepted in the charter of said company of eighteen hundred and sixty-four, to the amount of the lands that have been granted, sold, reserved, occupied by homestead settlers, pre-empted or otherwise disposed of subsequent to the passage of the act of July two, eighteen hundred and sixty-four. And that twenty-five miles of said main line between its western terminus and the city of Portland, in the State of Oregon, shall be completed by the first day of January anno Domini eighteen hundred and seventy-two, and forty miles of the remaining portion thereof each

year thereafter, until the whole shall be completed between said points; provided, that all lands hereby granted to said company which shall not be sold or disposed of or remain subject to the mortgage by this act authorized, at the expiration of five years after the completion of the entire road, shall be subject to settlement and pre-emption like other lands at a price to be paid to said company not exceeding two dollars and fifty cents per acre; and if the mortgage hereby authorized shall at any time be enforced
53 by foreclosure or other legal proceedings, or the mortgaged lands hereby granted, or any of them be sold by the trustees to whom such mortgage may be executed, either at its maturity or for any failure or default of said company under the terms thereof, such lands shall be sold at public sale, at places within the States and Territories in which they shall be situated, after not less than sixty days' previous notice, in single sections or subdivisions thereof, to the highest and best bidder; provided, further, that in the construction of said railroad American iron and steel only shall be used, the same to be manufactured from American ore exclusively."

"SECTION 2. And be it further resolved, That Congress may at any time alter or amend this joint resolution, having due regard to the rights of said company and other parties."

V.

That thereafter said Northern Pacific Railroad Company proceeded with the work of surveying and definitely locating the line of its branch railroad, extending from Pasco Junction, a point on the main line of said railroad in the Territory (now State) of Washington, to Tacoma, in the Territory (now State) of Washington, a point on Puget sound, and, prior to March 26th, 1884, had so surveyed and definitely located said branch railroad, hereinafter for the purpose of convenience, designated as the Cascade branch, extending coterminous with and within forty miles of the northeast quarter of section nineteen, township twenty-seven north, range ten east, W. M., in the State of Washington, and on the 26th day of March, 1884, filed a plat of said portion of the definite location
54 of said Cascade branch, which said plat had theretofore been duly approved by the Secretary of the Interior in the office of the Commissioner of the General Land Office.

That, at the date of said grant to said Northern Pacific Railroad Company, and at the date of said joint resolution of May 31, 1870, and at the time the line of said Cascade branch of said Northern Pacific Railroad Company, coterminous with said described land, was definitely fixed and located and a plat thereof filed in the office of the Commissioner of the General Land Office, to wit, on March 26th, 1884, said land was public land to which the United States had full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights (except the claim and right of said Northern Pacific Railroad Company, if any it had by reason of the facts herein stipulated), unless the facts herein stipulated and acts of Congress passed prior to said 26th day of March,

1884, constituted a reservation, sale, grant, or appropriation otherwise, or created other claims or rights from which said land was not free at said date.

That after fixing the line of said Cascade branch coterminous with said land as aforesaid, the said Northern Pacific Railroad Company proceeded with the construction of its railroad and telegraph line on, over, and along said line of definite location; and, having constructed a section of over twenty-five consecutive miles of said railroad and telegraph line extending opposite to and coterminous with said land, the Northern Pacific Railroad Company so reported to the President of the United States, and thereupon the President of
55 the United States appointed three commissioners to examine said line of railroad and telegraph; and the said commissioners, having examined said constructed railroad and telegraph line extending opposite to and coterminous with the hereinbefore-described land, reported that the same had been constructed in a good, substantial, and workmanlike manner, and in all respects as required by said act of Congress; and thereupon, on, to wit, April 23, 1884, the President of the United States approved said report and accepted said railroad and telegraph line, and directed that patents for the odd-numbered sections of public lands, not mineral, coterminous therewith, should be issued, conveying the said lands to said Northern Pacific Railroad Company. That no patent has been issued to said Northern Pacific Railroad Company, or its successors, and the survey of said premises, or any part thereof, was not filed until eleventh day of April, 1899.

VI.

That the Northern Pacific Railway Company is a corporation organized, created, and existing under and by virtue of the laws of the State of Wisconsin, and is a citizen of the State of Wisconsin, and was not organized, nor is it a corporation, under the laws of the State of Washington.

VII.

That on or about the 31st day of August, 1896, the said Northern Pacific Railway Company, by virtue of certain deeds of conveyance, duly signed, executed, and delivered, became the successor in interest of said Northern Pacific Railroad Company, and became the owner
56 of all the property, of whatsoever kind, of said Northern Pacific Railroad Company, under and by virtue of foreclosure, sale, and confirmation of sale in that certain action in the above-named court wherein The Farmers' Loan and Trust Company was complainant, and the said Northern Pacific Railroad Company *et al.* were defendants.

VIII.

That the said Northern Pacific Railway Company now is, and ever since the 31st day of August, 1896, has been, continuously operating said railroad as a common carrier for the purpose of transporting passengers, freight, and the United States mails.

IX.

That the northeast quarter of section nineteen, township and range aforesaid, in which the claims sought to be patented by defendant Soderberg are included, is rough and mountainous land, and its principal value consists in the existence thereon of a ledge of granite running through said alleged claims, of a good and merchantable quality, valuable for building stone, which is capable of being, and subject to being, quarried, and is of the value of more than five thousand dollars.

That defendant, without permission or consent of complainant or its predecessor in interest, and against the will of complainant and its predecessor in interest, has quarried and removed from said premises and sold and disposed of large quantities of granite; that defendant claims to have entered upon said premises and property under and by virtue of certain acts and things hereinafter set forth,
and claims the same as mineral land, or as land valuable
57 chiefly for its building stone, and claims it is excepted from
the grant to the Northern Pacific Railroad Company by reason of its character; and claims the right to enter and patent the same as stone land under the acts of Congress relating thereto.

That on or about April 14th, 1897, defendant was a citizen of the United States and qualified to enter mineral land under the laws of the United States, and said land being at said time unsurveyed, the defendant, in accordance with the mining laws of the United States (if the stipulated facts herein show the lands to be excepted from said grant, or enterable under such laws) and regulations and rules of the mining district in which the lands in controversy are situated, did enter and locate portions of the land described in the bill of complaint herein, and under the laws and rules and regulations relating to placer mineral claims (if the stipulated facts herein show such to be so excepted or enterable), which portions of said land are described in the answer of the defendant herein as the "Lillie" and "Linea" mining claims; but this shall not be construed as an admission on the part of the complainant that defendant had any right to make the same on said lands, but only to admit that defendant was qualified to do, and did do, what the law authorized and required, if the land in controversy was subject to location and appropriation.

That defendant did, on or about the 16th day of April, 1897, cause a record of said location of said alleged mining claims to be filed and entered upon the public record of the mining district of the county of Snohomish, the county in which said lands and alleged
mineral claims were situated, as authorized and required by
58 the laws of the State of Washington and the United States,
which location contains the names of defendant, locator, date of location, together with such a description of the alleged claims, located by reference to some natural object or permanent monument, as to enable said alleged claims to be identified.

X.

That defendant entered upon said premises and developed the portions thereof claimed by him as stone claims, and expended in labor and improvements upon and developing each of said alleged claims more than five hundred dollars ($500.00).

XI.

That on or about the 5th day of October, 1898, defendant filed in the land office at Seattle, Washington, the same being the land office of the district in which the said land is located, an application to purchase said portions of said premises as defendants had undertaken to locate as mineral claims, and did then and there make oath before the register and receiver of said land office and file the same in said land office, showing compliance with the laws, rules, and regulations as to the location of placer claims, if the premises in controversy were subject to placer location; and filed in said office a plat and field-notes of the survey of said alleged claims, made under the direction of the United States surveyor general of the State of Washington, and showing accurately the boundaries of said alleged claims, and each of them, which were distinctly marked by monuments on the ground, and showing further that said alleged
59 claims would fall within the borders of the northeast quarter of section nineteen, township twenty-seven north, range ten east, W. M., when the public survey should be extended thereover; and did then and there, previous to the filing the said application, post in a conspicuous place on the alleged claims embraced therein a copy of said plat, together with a notice of said application for patent, which said plat and notice did then and there remain conspicuously posted on the said premises during the period of publication hereinafter mentioned; and defendant did then and there file in the said land office with his application an affidavit of two persons that such plat and the notice had been duly posted, and likewise filed at said time in said land office a copy of said notice so posted, and by such application he requested to be permitted to purchase said claims as mineral land, and he then and there undertook and offered to maintain by proof that the said claims were valuable only for the granite and building stone contained therein and thereon, and were mineral lands of the United States and subject to location under the laws, rules, and regulations pertaining to placer mineral claims; that defendant has done the required amount of work and labor and improvements thereon to entitle him to a patent if the said lands are mineral lands and subject to entry and patent under the laws of the United States to any person or corporation other than the Northern Pacific Railroad Company, its successors or assigns; that said application, affidavit, notice, plat, and field-notes being filed as aforesaid
and entered of record in said United States land office, the
60 register and receiver of said land office set for hearing the said application, and notice of said application and hearing was given and published by the register for period of sixty days in a newspaper published in the vicinity of said alleged claims, desig-

nated for that purpose; and the said register did also post said notice in his office for the same period, which said purported entry, application, affidavits, notice, plat, and field-notes were in all respects formal and according to law; and defendant filed at said time with his said application the certificate of the United States surveyor general that over five hundred dollars' ($500.00) worth of labor had been expended or improvements made upon each of the said alleged claims by the defendant, and which said plat, so filed, was correct and contained such further description, by reference to natural objects and permanent monuments, as surveyed, to identify the said alleged claims, and each of them, and furnish an accurate description to be incorporated in the patent if issued; and at the expiration of said sixty days of publication said defendant filed an affidavit in said land office showing that said plat and notice aforesaid had been posted in a conspicuous place on the said alleged claims, and had remained and been kept so posted during said period of publication.

XII.

That no protest or adverse claim was filed with the register or receiver, or either of them, of said land office within the said period of sixty days, or at any other time, or at all, by any person or persons whomsoever.

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XIII.

That defendant has complied with all the rules and regulations of the Land Department of the United States, and made the proof as hereinbefore set forth, and it was assumed and decided by the Land Department of the United States, upon such *ex parte* proceedings, that the defendant was entitled to a patent, upon payment of the proper fees and the price per acre for said land, and further held that no adverse claim has been filed or existed.

That defendant has paid all fees required in said land office and paid the Government price per acre for said land, and on the 20th day of December, 1898, received from the register and receiver of the land office at Seattle their receiver's receipt, showing the said sum to be in payment in full for the area embraced in the alleged mining claims known as the "Lillie" and "Linea," which claims are fully and particularly described in the answer of the defendant herein in this action, and which said proof and records were duly transmitted to the Land Department of the United States, Washington, D. C., with the recommendation of the register and receiver that patent be issued in due form to the defendant for the said portions of the tract in controversy embraced in the description of the alleged mineral claims, and which patent if not already issued, will issue in due course of time, and as soon as the officers of the Land Department can, in the regular course of business, issue the same.

XIV.

62 That the Government survey of the lands in the township, including the lands in the controversy herein, was filed in the local land office at Seattle, Washington, on April 11,

1899, but no survey of the said premises had theretofore been filed in said land office or elsewhere.

Dated this 20th day of September, 1899.

STEPHENS & BUNN,
Solicitors and Attorneys for Complainant.
BALLINGER, RONALD & BATTLE,
Solicitors and Attorneys for Defendants.

(Endorsed:) Stipulation. Filed in the United States circuit court, district of Washington, Sep. 30, 1899. A. Reeves Ayres, clerk. H. M. Walthew, dep.

In the Circuit Court of the United States, District of Washington, Northern Division.

NORTHERN PACIFIC RAILWAY COMPANY, Complainant, *vs.* J. A. SODERBERG, Defendant. } Filed February 8, 1900.

Opinion.

Suit in equity for an injunction, and to determine adverse claims of title to part of an odd-numbered section of land situated in the State of Washington, and within 40 miles from the completed
63 part of the line of the Northern Pacific railroad. The Northern Pacific Railway Company, successor of the Northern Pacific Railroad Company, claiming the same as a part of the land granted by the act of Congress of July 2, 1864, to aid in the construction of a railroad and telegraph line from Lake Superior to Puget sound (13 U. S. Stat. 365), and the defendant, J. A. Soderberg, who, when the suit was commenced, was in possession of said land, and engaged in quarrying and disposing of merchantable granite, claiming title to the land and a right to remove stone therefrom, under proceedings commenced by him to acquire the title from the United States as a placer mining claim, pursuant to the act of Congress of August 4, 1892, entitled "An act to authorize the entry of lands chiefly valuable for building stone under the placer mining laws" 2 Supp. U. S. R. S.) Decree for defendant.

H. M. Stephens, for complainant.
Ballinger, Ronald and Battle, for defendent.

HANFORD, *District Judge:*

The land which is the subject of this suit contains a large and valuable ledge of granite; it is situated in the Cascade mountains, and is apparently of no value except for the granite. There is no controversy between the parties as to any material fact, and their rights with respect to the land depend entirely upon the determination of the question whether granite is a "mineral" within the definition of that word as it is used in the act of Congress granting lands to aid in the construction of the Northern Pacific railroad. The de-

fendant has perfected his right to the land, if a title can be
64 lawfully acquired to part of an odd-numbered section which is valuable chiefly for stone, and situated within the limits of the Northern Pacific Railroad Company's grant. The Land Department has decided the question in favor of the defendant, and issued a patent to him.

In the month of April, 1895, this court, at a term held at Spokane, decided the question the other way, in the case of Northern Pacific Railroad Company *vs.* Stanton. At that time the court did not have an opportunity to study the question as thoroughly as it appears to have been studied by the counsel who have argued this case, no opinion was prepared, and the considerations upon which the decision was based have not been publicly set forth; therefore, to justify a departure from a precedent, it is proper at this time to say the court then considered that the act of Congress of June 3, 1878, authorizing the sale of lands chiefly valuable for stone, on the same terms as timber lands (1 Supp. U. S. R. S. 2d ed. 187), and the act of August 4, 1892, authorizing the entry of lands chiefly valuable for building stone under the placer mining laws (2 Supp. U. S. R. S. 65) placed stone lands in a class separate and distinct from other mineral lands, and justified an inference that the word "mineral," as used in prior acts, was understood and intended by the legislative branch of the Government as having a limited definition including only metal-iferous minerals. The second section of the act of 1892 extends the act of 1878 to all the public-land States, so there can be no presumption that it repeals the act of 1878 by implication. The court, as then informed, supposed that its decision in the Stanton case was in harmony with the rule at
65 that time prevailing in the Land Department. (See Conlin *vs.* Kelley, 12 Land Decisions, 1; Clark *vs.* Ervin, 16 Land Decisions, 122; Hayden *vs.* Jamison, 16 Land Decisions, 537; South Dakota *vs.* Vermont Stone Co., 16 Land Decisions, 263; Florence *vs.* Delaney, 17 Land Decisions, 120; Tucker *vs.* Florida R. & M. Co., 19 Land Decisions, 414.) In the presentation of this case the attorneys on both sides have made oral and written arguments supporting their respective contentions with great force and much learning, and after considering the same with deliberation, I am fairly convinced that the reasons controlling the decision in the Stanton case are insufficient, and it appears also that the practice in the Land Department is now governed by a different rule, as shown by the action of the department in issuing a patent to the defendant for the land which is the subject of controversy in this case. In its common and ordinary signification the word "mineral" is not a synonym for "metal," but is a comprehensive term including every description of stone and rock deposits, whether containing metallic substances or entirely non-metallic. Congress having chosen a word of such broad significance to define the class of lands reserved from the grant to the Northern Pacific railroad, the courts and the Land Department have no authority to construe the act, giving a narrow or limited definition to the word, in order to enhance the value of the grant and to diminish the rights of the general public in the lands

reserved, unless the act itself or other acts of Congress prescribe conditions which require an interpretation of the statute, allowing the word to have force only in a restricted sense. The granting act itself does not expressly or by implication so prescribe otherwise than by making an exception of coal and iron. Looking, then, for other acts of Congress which might be regarded as giving a legislative construction to the granting act, I find only one which indicates a purpose to give a legislative definition to the word "mineral" as it is there used; that is the act of February 26, 1895, to provide for the examination and classification of certain mineral lands in the States of Montana and Idaho, 2 Supp. U. S. R. S. 385; this statute provides for a commission to examine and classify the odd-numbered sections of land within the limits of the Northern Pacific Company's grant in the States of Montana and Idaho, and the 3d section reads as follows:

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"That all said lands shall be classified as mineral which by reason of valuable mineral deposits are open to exploration, occupation, and purchase under the provisions of the United States mining laws, and the commissioners in making the classification hereinafter provided for shall take into consideration the mineral discovered or developed on or adjacent to such land, and the geological formation of all lands to be examined and classified, or the lands adjacent thereto, and the reasonable probability of such land containing valuable mineral deposits because of its said formation, location, or character. * * * Provided, that the word 'mineral' where it appears in this act, shall not be held to include iron or coal."

If Congress had intended by this act to interpret the reservation clause of the granting act, so as to give a restricted definition to the word "mineral," there is no good reason why it should not have directed that only lands valuable for the metalliferous minerals therein should be classified as mineral lands, and it is significant that instead of prescribing any such limited rule, the words of the act correspond with the words in the grant expressing the purpose to reserve all minerals, the test being not the nature or quality of the mineral, but its value, and lands containing any mineral deposits of sufficient value to be subject to sale by the Government under the provisions of the United States mining laws, are required to be classified so as to come within the class of lands which are reserved. This statute must be understood as referring to the United States mining laws in force at the time of its enactment, including the act of August 4, 1892, by which lands "that are chiefly valuable for building stone" were made subject to entry under the provisions of the law in relation to placer mineral claims. It may be conceded that Congress could not, after the granted lands had been earned, by any form of enactment withdraw any part not in fact originally reserved, and the court is not at all inclined to give any such effect to the act of 1895. But the complainant in this case contends for an interpretation of the granting act in accordance with a supposed particular legislative intent which is not expressed by the words of the statute according to the definitions found in the dictionaries, and in prosecuting an inquiry

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as to the intent of the legislature it is not improper to give due consideration and weight to the repeated and harmonious expressions found in the statutes. It is not to be presumed that the intention or purpose of Congress with respect to what lands should be
68 granted and what reserved was changed between the time of making the grant and the enactment of the law providing for the classification of the lands within the limits of the grant in the States of Montana and Idaho, when no such change of intention or purpose is declared; on the other hand, it is fair to presume that the intention of Congress was the same with respect to mineral lands reserved from the grant in other States, that is expressly declared with reference to lands in Montana and Idaho.

On the part of the complainant it has been argued that prior to August 4, 1892, lands valuable for the deposits of stone contained therein were not regarded by Congress as mineral lands, else Congress would not have enacted the law of June 3, 1878, providing for the sale of such lands on the same terms as timber lands, nor have enacted a law specially providing for the entry of lands chiefly valuable for building stone under the laws providing for the disposition of placer mineral lands, and it must be admitted that this argument is supported by the decision of the circuit court of appeals for the ninth circuit, in the case of McFadden *vs.* Mountain View Min. & Mill. Co., 97 Fed. Rep. 670. I should not feel at liberty to disregard a decision of the appellate court, if the case under consideration necessarily had to turn upon the same point, but whilst it is true that the act of 1892 only prescribes a rule for the future, and therefore may not be treated as being declaratory of the previously existing law, still it does not follow as a logical deduction that lands chiefly valuable for the ledges and deposits of stone therein had been theretofore considered by Congress as non-mineral. If a new statute should be passed, providing a particular method of acquiring title to lands con-
69 taining valuable deposits of nickel or zinc, and also providing that the same character of lands may be entered under the general mining laws of the United States, thus giving to purchasers an option to acquire the title by either method, it would be just as reasonable to say that by implication the new law had added something to the list of recognized minerals, as to suppose that the act of 1892 had the effect to place stone for the first time in the list of minerals. On the part of the defendant, an argument has been made that because there was apparent confusion in the practice of the Land Department growing out of contradictory rulings with reference to stone lands, the act of 1892 was intended to avoid the consequences of certain decisions which class stone as non-mineral, and, therefore, it must be inferred that the act was intended to restore stone lands to classification of mineral lands, in harmony with the general policy of the Government. I do not rest my decision upon that inference. I hold that it does not clearly appear from all or any declarations of the legislative will that the word "mineral" in the grant to the Northern Pacific railroad was there used in a restricted sense, and the rules for construing statutes making grants

require that effect be given to the whole act, including the reservation clause, according to the common and general definition of the words selected by Congress.

Decree for the defendant.

C. H. HANFORD, *Judge.*

(Endorsed:) Opinion. Filed Feb'y 8, 1900. A. Reeves Ayres, clerk. By A. N. Moore, deputy.

70 In the Circuit Court of the United States for the District of Washington, Northern Division.

NORTHERN PACIFIC RAILWAY COMPANY (a Corporation), Complainant, *vs.* J. A. SODERBERG, Defendant. } No. 719.

Order to File Mineral Certificate.

It appearing to the court that counsel herein for the respective parties have stipulated since the submission of said cause that the solicitors for defendant may present to this court the mineral certificate No. 133 issued by the United States to J. A. Soderberg for the mining claims in controversy herein, it is, therefore, ordered that the defendant may file herein said mineral certificate, or a copy thereof, as a part of the record herein.

Dated this 19th day of February, A. D. 1900.

Enter.

C. H. HANFORD, *Judge.*

(Endorsed:) Order to file mineral certificate. Filed in the United States circuit court, district of Washington. Feb. 19, 1900. A. Reeves Ayres, clerk. H. M. Walthew, dep.

71 DEFENDANTS' EXHIBIT No. 1—MINERAL CERTIFICATE.

General Land Office No., 31803. Mineral certificate No. 133.

The United States of America to all to whom these presents shall come, Greeting:

Whereas, in pursuance of the provisions of the Revised Statutes of the United States, chapter six, title thirty-two and legislation supplemental thereto, there have been deposited in the General Land Office of the United States the plat and field-notes of survey and the certificate No. 133 of the register of the land office at Seattle, in the State of Washington, accompanied by other evidence, whereby it appears that John A. Soderberg did, on the twentieth day of December, A. D. 1898, duly enter and pay for that certain placer mining claim and premises, designated by the surveyor general as lot No. 415, known as the Linea and Lillie placer mining claims, embracing a portion of section nineteen, in township twenty-seven north of range ten east, Willamette meridian, in the Index mining district, in the county of

Snohomish, and State of Washington, in the district of lands subject to sale at Seattle and bounded, and described, and platted as follows, with magnetic variation as hereinafter stated:

Beginning, for the description of the Linea placer claim, at corner No. 1, a granite cliff in place, twelve feet above ground, chiseled 1–415, with a cross (X) at corner point situate on the west side of a canyon, from which a hemlock, thirty inches in diameter, blazed, and marked B. T. 1–415, bears north twenty-three degrees and fifty-
six minutes east, fifty-eight and eighty-four-hundredths feet
72 distant; a maple thirty inches in diameter, blazed and marked B. T. 1–415, bears north seventy-three degrees and nineteen minutes east, eight and sixty-four-hundredths feet distant; the corner common to sections thirteen and twenty-four, in township twenty-seven north of range nine east, and sections eighteen and nineteen, in township twenty-seven north of range ten east, Willamette meridian, bears north seventy-seven degrees and fifty-nine minutes west, two thousand four hundred and thirty-eight and eight-tenths feet distant, and the corner common to said sections eighteen and nineteen and seventeen and twenty, said township twenty-seven north of range ten east, Willamette meridian, bears north eighty degrees nineteen minutes and thirty seconds east, two thousand nine hundred and eighty-one and eight-tenths feet distant.

Thence, first course, magnetic variation twenty-two degrees and fifty minutes east, north seventy-three degrees and twenty minutes east, forty-eight feet, creek; six hundred feet to corner No. 2.

Thence second course, magnetic variation, twenty-three degrees and fifteen minutes east, south twelve degrees and thirty-eight minutes east, one thousand and thirty-eight feet to corner No. 3, from which discovery point bears north sixty degrees and thirty minutes west, four hundred and forty-seven and seven-tenths feet distant.

Thence, third course, magnetic variation, twenty-three degrees and twelve minutes east, south seventy-three degrees and twenty minutes west, six hundred feet to corner No. 4.

Thence, fourth course, magnetic variation twenty-three
73 degrees east, north twelve degrees and thirty-eight minutes west, one thousand and thirty-eight feet to corner No. 1, the place of beginning.

Beginning, for the description of the Lillie placer claim, at corner No. 1, a granite rock in place 8 x 4 inches, two feet above ground, chiseled with 2 1–415 with cross at corner point with mound of stone, identical with corner No. 2 of said Linea placer claim, from which a hemlock, twelve inches in diameter, blazed and marked B. T. 2 1–415, bears south forty-one degrees and thirty-seven minutes east, eighteen and twenty-six-hundredths feet distant; a fir, ten inches in diameter, blazed and marked B. T. 2 1–415, bears south eighty-nine degrees and forty-nine minutes west, ten and thirty-two-hundredths feet distant; the corner common to said sections thirteen and twenty-four, eighteen and nineteen, bears north eighty-three degrees thirty-one minutes and forty-five seconds west, two thousand nine hundred and seventy-nine and one-tenth feet distant, and the corner common to said sections seventeen, eighteen, nineteen, and

twenty bears north eighty-two degrees four minutes and thirty seconds east two thousand three hundred and eighty-seven and four-tenths feet distant.

Thence, first course, magnetic variation, twenty-three degrees and fifteen minutes east, south seventy-six degrees and thirty-four minutes east, four hundred and forty-seven feet to witness corner to corner No. 2, a granite rock in place chiseled W. C. 2–415, with a cross (X) at corner point, with mound of rock, six hundred feet to corner No. 2, inaccessible.

74 Thence, second course, magnetic variation, twenty-three degrees and twenty minutes east, south twelve degrees and thirty-eight minutes east, two hundred and thirty-five and one-tenth feet to witness corner to corner No. 2, one thousand and thirty-eight feet to corner No. 3.

Thence, third course, magnetic variation, twenty-three degrees and ten minutes east, north seventy-six degrees and thirty-four minutes west, two hundred and twenty feet right bank of Skykomish river, six hundred feet to corner No. 4, identical with corner No. 3 of said Linea placer claim.

Thence, fourth course, north twelve degrees and thirty-eight minutes west, one thousand and thirty-eight feet to corner No. 1, the place of beginning.

Said lot No. 415 containing twenty-seven acres and one hundred and five thousandths of an acre of land, more or less.

Now know ye, that there is, therefore, hereby granted by the United States unto the said John A. Soderberg, and to his heirs and assigns, the said placer mining premises heretofore described.

To have and to hold said mining premises, together with all the rights, privileges, immunities, and appurtenances of whatsoever nature thereunto belonging, unto the said grantee above named, and to his heirs and assigns forever; subject nevertheless, to the following conditions and stipulations:

First. That the grant hereby made is restricted in its exterior limits to the boundaries of the said mining premises, and to any veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, which

75 may have been discovered within said limits subsequent to and which were not known to exist on the fifth day of October, A. D. one thousand eight hundred and ninety-eight.

Second. That should any vein or lode of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits be claimed or known to exist within the above-described premises at said last-named date, the same is expressly excepted and excluded from these presents.

Third: That the premises hereby conveyed may be entered by the proprietor of any vein or lode of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper or other valuable deposits, for the purpose of extracting and removing the ore from such vein or lode, should the same, or any part thereof, be found to penetrate, intersect, pass through or dip into the mining ground or premises hereby granted.

Fourth. That the premises hereby conveyed shall be held subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local laws, customs, and decisions of courts. And there is reserved from the lands hereby granted a right of way thereon for ditches or canals constructed by the authority of the United States.

Fifth. That in the absence of necessary legislation by Congress, the legislature of Washington may provide rules for working the mining claim or premises hereby granted, involving easements, drainage, and other necessary means to complete development thereof.

76 In testimony whereof, I, William McKinley, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the city of Washington, the sixteenth day of November, in the year of our Lord one thousand eight hundred and ninety-nine, and of the Independence of the United States the one hundred and twenty-fourth.

By the President:

WILLIAM McKINLEY,
By F. M. McKEAN, *Secretary.*

C. M. BUSH,
Recorder of the General Land Office.

(United States General Land Office.)

E. G. E. Recorded vol. 284, pages 177 to 180, inclusive.

(Endorsed:) Defendant's Exhibit No. 1. Filed in the United States circuit court, district of Washington, Feb. 19, 1900. A. Reeves Ayres, clerk. R. M. Hopkins, dep.

77 In the Circuit Court of the United States for the District of Washington, Northern Division.

NORTHERN PACIFIC RAILWAY COMPANY (a Corporation), Complainant, *vs.* J. A. SODERBERG, Defendant. } No. 719.

Decree.

This cause coming on to be heard at this term upon the amended bill of complaint herein, the amended answer of the defendant thereto, the replication of complainant to such answer, and upon the written stipulation of the respective parties covering the facts and proofs herein, and the patent hereinafter mentioned submitted upon further stipulation of the respective parties, and upon consideration

thereof, it is found and hereby ordered, adjudged, and decreed that the defendant, J. A. Soderberg, is the owner of those certain placer mining claims known as the "Linea" and "Lillie," embracing a portion of section 19, in township 27 north of range 10 east, Willamette meridian, in the Index mining district, in the county of Snohomish, State of Washington, and in the district of lands subject to sale at Seattle, and bounded, described, and platted as
78 more specifically described in the United States patent issued November 16th, 1899, to said Soderberg, being mineral certificate No. 13[illegible], and recorded in the General Land Office in volume 284, pages 177 to 180, inclusive.

And it is further ordered, adjudged, and decreed that the title of J. A. Soderberg in and to said mining claims be, and the same is hereby, quieted and confirmed in him.

And it is further ordered, adjudged, and decreed that the bond heretofore given by the said J. A. Soderberg in this cause, in the penal sum of five thousand ($5,000) dollars, for the faithful fulfillment or payment of any decree that might be awarded in behalf of complainant, be, and the same is hereby, canceled and held for naught.

And it is further ordered, adjudged, and decreed that the said defendant, J. A. Soderberg, do recover of the plaintiff his costs, charges, and disbursements herein incurred to be taxed.

Dated this 24th day of February, A. D. 1900.

Enter.

C. H. HANFORD, *Judge.*

(Endorsed:) Decree. Filed in the United States circuit court, district of Washington, Feb. 24, 1900. A. Reeves Ayres, clerk. H. M. Walthew, dep.

79 In the Circuit Court of the United States for the District of Washington, Northern Division.

NORTHERN PACIFIC RAILWAY COMPANY (a Corporation), Complainant, vs. J. A. SODERBERG, Defendant.	No. 719.

Amended Decree.

This cause coming on to be heard at this term upon the amended bill of complaint herein, the amended answer of the defendant thereto, the replication of complainant to such answer, and upon the written stipulation of the respective parties covering the facts and proofs herein, and the patent hereinafter mentioned submitted upon further stipulation of the respective parties, and upon consideration thereof, it is found and hereby ordered, adjudged, and decreed that the defendant, J. A. Soderberg, is the owner of those certain placer mining claims known as the "Linea" and "Lillie," embracing a portion of section 19 in township 27 north of range 10 east, Willamette meridian, in the Index mining district in the county of

Snohomish, State of Washington, and in the district of lands
80 subject to sale at Seattle, and bounded, described, and platted as more specifically described in the United States patent issued November 16th, 1899, to the said Soderberg, being mineral certificate No. 133, and recorded in the General Land Office in volume 284, pages 177 to 180, inclusive.

And it is further ordered, adjudged, and decreed that the title of J. A. Soderberg in and to said mining claims be, and the same is hereby, quieted and confirmed in him.

And it is further ordered, adjudged and decreed that the bond heretofore given by the said J. A. Soderberg in this cause, in the penal sum of five thousand ($5,000) dollars for the faithful fulfillment or payment of any decree that might be awarded in behalf of complainant be, and the same is hereby, canceled and held for naught.

It is further ordered, adjudged and decreed that the said defendant, J. A. Soderberg, do recover of the plaintiff his costs, charges, and disbursements herein incurred to be taxed.

And it is further ordered, adjudged, and decreed that complainant's bill of complaint herein be, and the same hereby is, dismissed, and that respodent recover his costs herein incurred to be taxed.

Dated this 8th day of March, 1900.

Enter.

C. H. HANFORD, *Judge.*

(Endorsed:) Amended decree. Filed in the United States circuit court, district of Washington, March 8, 1900. A Reeves Ayres, clerk. H. M. Walthew, dep.

81 In the Circuit Court of the United States for the District of Washington, Northern Division.

NORTHERN PACIFIC RAILWAY COMPANY, Complainant and Appellant,
vs.
J. A. SODERBERG, Defendant and Respondent.

Petition for Appeal and Order Allowing Same.

The above-named complainant and appellant, The Northern Pacific Railway Company, conceiving itself aggrieved by the order and decree made and entered in the above-named court in the above-entitled cause on the 24th day of February, 1900, and the amended decree entered on March 8, 1900, wherein and whereby it was ordered, adjudged, and decreed as follows—

"It is found and hereby ordered, adjudged, and decreed that the defendant, J. A. Soderberg, is the owner of those certain placer mining claims known as the 'Linea' and 'Lillie,' embracing a portion of section 19, in township 27 north of range 10 east, Willamette meridian, in the Index mining district, in the county of Snohomish, State of Washington, and in the district of lands subject to sale
82 at Seattle, and bounded, described, and platted as more specifically described in the United States patent issued Novem-

ber 16th, 1899, to said Soderberg, being mineral certificate No. 133, and recorded in the General Land Office in volume 284, pages 177 to 180, inclusive.

"And it is further ordered, adjudged, and decreed that the title of J. A. Soderberg in and to said mining claims be, and the same is hereby, quieted and confirmed in him.

"And it is further ordered, adjudged, and decreed that the bond heretofore given by the said J. A. Soderberg in this cause, in the penal sum of five thousand ($5,000) dollars for the faithful fulfillment or payment of any decree that might be awarded in behalf of complainant, be, and the same is hereby, canceled and held for naught.

"And it is further ordered, adjudged, and decreed that the said defendant, J. A. Soderberg, do recover of the plaintiff his costs, charges, and disbursements herein incurred to be taxed.

"And it is further ordered, adjudged, and decreed that complainant's bill of complaint herein be, and the same hereby is, dismissed, and that respondent recover his costs herein incurred to be taxed"—

does hereby appeal from said orders and decrees, and the whole and every part thereof, to the United States court of appeals for the ninth judicial circuit, for the reasons specified and set forth in the assignment of errors which is filed herewith, and it prays that this appeal may be allowed, and that a transcript of the record, proceedings,
and papers upon which said orders and decrees were made,
83 duly authenticated, may be sent to the United States circuit court of appeals for the ninth circuit.

STEPHENS & BUNN,
Solicitors for the Complainant and Appellant,
Northern Pacific Railway Company.

The foregoing petition on appeal is granted, and the claim of appeal therein made is allowed.

Done in open court this 19th day of March, 1900.

C. H. HANFORD,
District Judge and One of the Judges of said United States Circuit Court, Presiding Therein.

Due service of within petition, by receipt of a true copy thereof, admitted this 19th day of March, 1900.

BALLINGER, RONALD & BATTLE,
Attorney- for Defendant.

(Endorsed:) Petition for an appeal and order allowing appeal. Filed in the United States circuit court, district of Washington. Mar. 19, 1900. A. Reeves Ayres, clerk. H. M. Walthew, dep.

84 In the Circuit Court of the United States for the District of Washington, Northern Division.

NORTHERN PACIFIC RAILWAY COMPANY, Complainant and Appellant,
vs.
J. A. SODERBERG, Defendant and Respondent. } No. 719.

Assignment of Errors.

Comes now the above-named complainant and appellant, The Northern Pacific Railway Company, successor in interest of the Northern Pacific Railroad Company, and makes and files the following assignment of errors upon which it will rely in its appeal from the orders and decrees of the court made herein on the 24th day of February, and March 8, 1900, as follows, to wit:

I.

The court erred in not making, rendering, and entering decree in favor of complainant and appellant, The Northern Pacific Railway Company, and against the defendant and respondent, J. A. Soderberg, and in not granting an injunction restraining said respondent from in any manner interfering with the property described
85 in the amended bill of complaint, or taking granite therefrom without the consent of appellant.

II.

The court erred in not holding and deciding and decreeing that complainant and appellant is the owner of the property described in the amended bill of complaint.

III.

The court erred in not granting an injunction restraining respondent from committing waste or trespass upon the land described in the amended bill of complaint and owned by appellant.

IV.

The court erred in holding that defendant and respondent, J. A. Soderberg, is the owner of the alleged placer mining claims known as the "Linea" and "Lillie," and embracing a part of section nineteen, township twenty-seven north of range ten east of the Willamette meridian, and the said order and decree is erroneous in so holding and decreeing said Soderberg to be such owner.

V.

The court erred in holding said Soderberg is entitled to have the title to said alleged mineral claims quieted and confirmed in him, and the said order and decree are erroneous in ordering, adjudging, and decreeing the title of said mineral claims, or either of them, or any part of either of them, quieted and confirmed in said Soderberg.

VI.

The court erred in holding that the bond given by the de-
86 fendant and respondent, Soderberg, in the sum of five thou-
sand dollars, to secure the performance of the decree and the observance of the provisional injunction, *to* be canceled and discharged; and said decree is erroneous in ordering and decreeing said bon dcanceled and for naught held.

VII.

The court erred in holding and adjudging defendant and respondent Soderberg entitled to recover costs in this cause, and said decree is erroneous in adjudging and decreeing said defendant and respondent, Soderberg, should recover of complainant and appellant costs, charges, and disbursements in this cause.

VIII.

That the decree herein is erroneous in holding, determining, finding, or adjudging that the land involved herein is "mineral land" within the meaning of an act of Congress of the United States, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget's sound, on the Pacific coast, by the northern route," approved July 2d, 1864.

IX.

That the decree is erroneous in holding, ordering, adjudging, or decreeing that the lands described in complainant's and appellant's amended bill of complaint herein, or any part thereof, to wit, an odd-numbered section within less than forty miles of the line of definite location and construction of the railroad of the Northern
Pacific Railroad Company, a corporation under the laws of
87 Congress, were subject to entry or acquisition as stone land
or as a placer mineral claim, or subject to entry or location in any manner whatever.

X.

The court erred in dismissing the bill of complaint of complainant, and the decree is erroneous in so ordering and adjudging.

Wherefore, the complainant and appellant, The Northern Pacific Railway Company, successor in interest of the Northern Pacific Railroad Company, prays that the said order and decree of the circuit court of the United States, ninth circuit, district of Washington, northern division, be reversed, and that the said circuit court be directed to render and enter decree in favor of complainant and appellant and against defendant and respondent, in accordance with the prayer for this appeal and the prayer of the amended bill of complaint in this cause.

STEPHENS & BUNN,
Solicitors for Complainant and Appellant, Northern Pacific Railway Company.

Due service of within assignment of errors, by receipt of a true copy thereof, admitted this 19th day of March, 1900.

BALLINGER, RONALD & BATTLE,
Attorneys for Defendant.

(Endorsed:) Assignment of errors. Filed in the United States circuit court, district of Washington, Mar. 19, 1900. A. Reeves Ayres, clerk. H. M. Walthew, dep.

88 In the Circuit Court of the United States for the District of Washington, Northern Division.

NORTHERN PACIFIC RAILWAY COMPANY, Complainant and Appellant,
vs.
J. A. SODERBERG, Defendant and Respondent. } No. 719.

Order Fixing Amount of Appeal Bond.

The complainant and appellant, The Northern Pacific Railway Company, successor in interest of the Northern Pacific Railroad Company, having this day filed its petition for an appeal from the orders and decrees made, rendered, and entered herein on the 24th day of February and 8th day of March, 1900, to the United States circuit court of appeals, in and for the ninth judicial circuit, together with an assignment of errors within due time, and also praying that an order be made fixing the amount of bond and security which complainant and appellant should give and furnish on said appeal, and said petition and appeal having this day been allowed.

Now, therefore, it is ordered that the appeal bond herein be, and it is hereby, fixed at the sum of $500.00, conditioned and to the effect that the said company shall prosecute its said appeal to
89 effect, and shall answer all damages and costs that may be awarded against it if it fail to make its plea and appeal good. Said bond and security to be approved by the above-named court or judge presiding therein.

Done in open court this 19th day of March, 1900.

C. H. HANFORD,
District Judge and One of the Judges of the said United States Circuit Court, Presiding Therein.

O K.
B., R. & B.

(Endorsed:) Order. Filed in the United States circuit court, district of Washington, Mar. 19, 1900. A. Reeves Ayres, clerk. H. M. Walthew, dep.

In the Circuit Court of the United States for the District of Washington, Northern Division.

NORTHERN PACIFIC RAILWAY COMPANY, Complainant and Appellant,
vs.
J. A. SODERBERG, Defendant and Respondent.
} No. 719.

Bond on Appeal.

Know all men by these presents, that we, the Northern Pacific Railway Company, a corporation, as principal, and Jacob
90 Furth and R. V. Ankeny, as sureties, are held and firmly bound unto J. A. Soderberg in the full and just sum of $500.00, to be paid to said J. A. Soderberg, his attorneys, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 19th day of March, in the year of our Lord one thousand nine hundred.

Whereas, lately at a session of the circuit court of the United States for the district of Washington, northern division, in a suit pending in said court between the said Northern Pacific Railway Company, complainant and appellant, and J. A. Soderberg, defendant and respondent, a decree was rendered against the said Northern Pacific Railway Company, and the said Northern Pacific Railway Company having obtained from said court an order allowing an appeal to the United States circuit court of appeals to reverse the decree of the aforesaid suit, and a citation, directed to the said J. A. Soderberg, is about to be issued, citing and admonishing him to be and appear at the United States circuit court of appeals, for the ninth circuit, to be holden at San Francisco, California;

Now, the condition of the above obligation is such that if the said Northern Pacific Railway Company shall prosecute its said appeal to effect, and shall answer all damages and costs that may
91 be awarded against it, if it fails to make its plea good, then the above obligation is to be void; otherwise to remain in full force and virtue.

NORTHERN PACIFIC RAILWAY COMPANY,
By STEPHENS & BUNN, [SEAL.]
Its Solicitors.
JACOB FURTH. [SEAL.]
R. V. ANKNEY. [SEAL.]

STATE OF WASHINGTON,
County of King, } *ss:*

Jacob Furth and R. V. Ankeny, being first duly sworn, on oath, each for himself and not one for the other, deposes and says that he is a resident and freeholder in the district of Washington, and that

he is worth the sum mentioned in the foregoing bond and obligation over and above all just debts and liabilities and exclusive of property exempt from execution, in property situated in the State of Washington.

That he is not an officer of the above court or an attorney-at-law.

JACOB FURTH.
R. V. ANKENY.

Subscribed and sworn to before me this 19th day of March, 1900.

[NOTARIAL SEAL.] H. J. RAMSEY,
Notary Public in and for the State of Washington,
Residing at Seattle, Washington.

92 The foregoing bond and sureties therein and thereby offered are hereby approved this 19th day of March, 1900.

C. H. HANFORD,
District Judge and One of the Judges of the said Circuit Court, Presiding Therein.

Due service of within, by receipt of a true copy thereof, admitted this 19th day of March, 1900.

BALLINGER, RONALD & BATTLE,
Attorneys for Defendant.

(Endorsed:) Bond on appeal. Filed in the United States circuit court, district of Washington, March 19, 1900. A. Reeves Ayres, clerk. H. M. Walthew, dep.

UNITED STATES OF AMERICA, ss:

Citation.

(Copy.)

To J. A. Soderberg, Greeting:

You are hereby cited and admonished to be and appear at the United States circuit court of appeals for the ninth circuit, to be held at the city of San Francisco, in the State of California, within thirty days from the date of this writ, pursuant to an order allowing an appeal, entered and filed in the clerk's office of the circuit court of the United States for the district of Washington, northern division, in that certain suit or action numbered 719, wherein The Northern Pacific Railway Company, a corporation organized
93 and incorporated under the laws of the State of Wisconsin, is complainant and appellant, and you, the said J. A. Soderberg, are defendant, respondent, and appellee, to show cause, if any there be, why the order and decree rendered against the said complainant and appellant, as in the said order allowing an appeal mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, and the seal of said circuit court, this 19th day of

March, in the year of our Lord one thousand and nine hundred, and of our Independence the one hundred and twenty-fourth.

C. H. HANFORD,
United States District Judge for the District of Washington, Sitting as Judge of said Circuit Court of the United States for the Ninth Circuit, District of Washington.

Attest:
A. REEVES AYRES,
Clerk of said Circuit Court of the United States for the Ninth Circuit, District of Washington,
[SEAL.] By H. M. WALTHEW, *Deputy.*

Service of the foregoing citation and receipt of a copy thereof admitted at Seattle, Washington, this 19th day of March, 1900.

BALLINGER, RONALD & BATTLE,
Solicitors for said J. A. Soderberg, Defendant, Respondent, and Appellee.

94 (Endorsed:) Citation and admission of service. Filed in the United States circuit court, district of Washington, Mar. 19, 1900. A. Reeves Ayres, clerk. H. M. Walthew, dep.

In the Circuit Court of the United States in and for the Ninth Judicial Circuit, District of Washington, Northern Division.

NORTHERN PACIFIC RAILWAY COMPANY, Complainant,
vs.
J. A. SODERBERG, Defendant.

Stipulation as to Making up of Record.

It is hereby stipulated and agreed by and between the complainant, Northern Pacific Railway Company, by its solicitors, and the defendant, J. A. Soderberg, by his solicitors, that the transcript of record on appeal to the United States circuit court of appeals for the ninth circuit in the above-entitled cause shall be made up of the following-named papers, which are, and constitute, all material matters on said appeal, to wit: Subpœna and return thereof, amended bill of complaint, amended answer to amended bill of com-
95 plaint, answer to cross-bill and counter-claim, replication, order allowing provisional injunction, order modifying injunction, stipulation as to facts, order allowing filing of patent, patent, opinion of the court upon final hearing, decree, amended decree, petition for appeal and order allowing appeal, assignment of errors, order fixing bond on appeal, bond on appeal, citation on appeal and proof of service thereof, and this stipulation.

Dated this 20th day of March, A. D. 1900.

STEPHENS & BUNN,
Solicitors for Complainant.
BALLINGER, RONALD & BATTLE,
Solicitors for Defendant.

(Endorsed:) Stipulation as to making up of record. Filed in the United States circuit court, district of Washington, Mar. 22, 1900. A. Reeves Ayres, clerk. A. N. Moore, dep.

96 In the Circuit Court of the United States for the District of Washington, Northern Division.

NORTHERN PACIFIC RAILWAY COMPANY, Complainant,
vs.
J. A. SODERBERG, Defendant. } No. 719.

Clerk's Certificate to Transcript.

UNITED STATES OF AMERICA, *District of Washington,* } ss:

I, A. Reeves Ayres, clerk of the circuit court of the United States for the district of Washington, do hereby certify the foregoing seventy-seven (77) typewritten pages, numbered from one (1) to seventy-seven (77), inclusive, to be a full, true, and correct copy of the record and proceedings in the above-entitled cause, as the same remains on file and of record in the office of the clerk of the circuit court of the United States for the district of Washington, at Seattle, in the northern division of said district, and that the same constitutes the transcript of the record on appeal in the above-entitled cause from said circuit court of the United States for the dis-

97 trict of Washington, to the United States circuit court of appeals for the ninth judicial circuit.

I further certify that I hereto annex and herewith transmit the original citation issued in said cause.

I further certify that the cost of preparing and certifying the foregoing transcript on appeal is the sum of $23.55, and that the same has been paid to me by Messrs. Stephens & Bunn, attorneys for complainant and appellant above named, Northern Pacific Railway Company.

In witness whereof, I have hereunto set my hand and the seal of said circuit court this April 2, 1900.

[SEAL.]

A. REEVES AYRES,
Clerk of the Circuit Court of the United States for the District of Washington,
By R. M. HOPKINS, *Deputy Clerk.*

[Ten-cent U. S. int. rev. stamp, canceled.]

UNITED STATES OF AMERICA, ss:

Citation.

(Original.)

To J. A. Soderberg, Greeting:

You are hereby cited and admonished to be and appear at the United States circuit court of appeals for the ninth circuit, to be held at the city of San Francisco, in the State of California, within

thirty days from the date of this writ, pursuant to an order al-
98 lowing an appeal, entered and filed in the clerk's office of the circuit court of the United States for the district of Washington, northern division, in that certain suit or action numbered 719, wherein The Northern Pacific Railway Company, a corporation organized and incorporated under the laws of the State of Wisconsin, is complainant and appellant, and you, the said J. A. Soderberg, are defendant, respondent, and appellee, to show cause, if any there be, why the order and decree rendered against the said complainant and appellant, as in the said order allowing an appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, and the seal of said circuit court, this 19th day of March, in the year of our Lord one thousand and nine hundred, and of our Independence the one hundred and twenty-fourth.

C. H. HANFORD,
United States District Judge for the District of Washington, Sitting as Judge of said Circuit Court of the United States for the Ninth Circuit, District of Washington.

Attest: A. REEVES AYRES,
Clerk of said Circuit Court of the United States for the Ninth Circuit, District of Washington,
[SEAL.] By H. M. WALTHEW, *Deputy.*

99 Service of the foregoing citation and receipt of a copy thereof admitted at Seattle, Washington, this 19th day of March, 1900.

BALLINGER, RONALD & BATTLE,
Solicitors for said J. A. Soderberg, Defendant, Respondent, and Appellee.

(Endorsed:) No. 719. In the circuit court of the United States, district of Washington, northern division. Northern Pacific Railway Co., complainant, *vs.* J. A. Soderberg, defendant. Citation and admission of service. Filed in the United States circuit court, district of Washington, Mar. 19, 1900. A. Reeves Ayres, clerk. H. M. Walthew, dep. Stephens & Bunn, Peyton block, Spokane, Wash., attorneys for complainant.

(Endorsed:) No. 601. In the United States circuit court of appeals for the ninth circuit. The Northern Pacific Railway Company (a corporation, etc.), appellant, *vs.* J. A. Soderberg, appellee. Transcript of record. Appeal from the circuit court of the United States for the district of Washington, northern division. Filed April 5, 1900. F. D. Monckton, clerk.

100 In the United States Circuit Court of Appeals for the Ninth Circuit.

THE NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, etc., Appellant,
vs.
J. A. SODERBERG, Appellee.
No. 601.

James B. Kerr, for the appellant; R. A. Ballinger, for the appellee.

Before Gilbert, Ross, and Morrow, circuit judges.

The Northern Pacific Railway Company appeals from a decree of the circuit court dismissing its bill in a suit brought to restrain J. A. Soderberg, the appellee, from removing granite from the northeast quarter of section 19, township 27 N., range 10 east, of the Willamette meridian, in the State of Washington. The bill alleges that the land in question is part of an odd-numbered section situated within the forty mile or place limits of the grant
101 to the Northern Pacific Railroad Company by act of Congress approved July 2, 1864, that the title to said land passed to the railroad company upon the definite location of its line of road, which title the appellant has acquired by purchase, that there is situated upon said premises a ledge of granite of good quality of the value of more than five thousand dollars, and that the defendant is engaged in quarrying and removing the same. The defendant answered alleging that the premises were excepted from the grant to the Northern Pacific Railroad Company, by reason of the fact that they contained granite valuable for building purposes, and alleged further that the defendant had made an entry of the premises under the mineral laws of the United States. The answer set forth an affirmative defense in the nature of a cross-bill, alleging the facts of the defendant's entry of the premises under the mineral laws of the United States, and praying that he be decreed to be the owner of the premises covered by his entry. The case was heard upon an agreed statement of facts, in which it was shown that the line of the railroad was definitely located opposite the premises in controversy on March 26, 1884, and that it was a portion of the main line over the Cascade mountains authorized by act of Congress of July 2, 1864, which, under the joint resolution of May 31, 1870, was designated the branch line; that at the date of the grant and at the date of the location of the road opposite the premises in controversy, the land was public land to which the United States had full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, unless the other facts stipulated and the acts of Congress passed previous to March 26, 1884, constituted a reservation
102 or appropriation; that the land in controversy is rough and mountainous land, and its principal value consists in the granite thereon, which is of good and merchantable quality, valuable for building stone, and of the value of more than five thousand dollars; that on April 14, 1897, the defendant entered certain por-

tions of said quarter section of land under the placer mining laws of the United States, and on April 26, 1897, he caused a record of the location of his claims to be filed and entered upon the public records of the mining district in which the land is situated. The stipulation sets forth further facts sufficient to show that the appellee acquired title to said mining claims under the mineral laws of the United States, provided that said lands were subject to entry under such mining laws.

GILBERT, circuit judge, after stating the case as above, delivered the opinion of the court:

The question presented in this case is whether land which is chiefly valuable for granite of a good, merchantable quality is mineral land within the meaning of the exception from the grant of lands to the Northern Pacific Railroad Company. Section 3 of the act of July 2, 1864, grants to the railroad company certain odd-numbered sections not mineral "and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office." There is a proviso that "all mineral lands" are excluded from the operations of the act, and in lieu thereof a
103 like quantity of unoccupied and unappropriated agricultural lands, in odd-numbered sections, nearest to the line of said road may be selected. There is a further proviso "that the word 'mineral,' when it occurs in this act, shall not be held to include iron or coal." Section 2 of the act confers upon the railroad company power and authority to take from the public lands adjacent to the line of said road materials of earth, stone, timber, etc., for the construction thereof.

It is contended by the appellant that in all the congressional legislation relating to minerals and mineral lands prior to and including the grant to the Northern Pacific Railroad Company, the terms "mineral" and "mineral land" were used in their proper and ordinary sense, and were intended to embrace only such substances as were obtained from mines. Reference is made to the ordinance of May 20, 1785, for the disposal of lands in the western territory, in which there was reserved "one-third part of all gold, silver, lead, and copper mines, to be sold or otherwise disposed of, as Congress shall hereafter direct," and to acts of Congress in which lead mines and salines were reserved in the disposition of public lands, and especially to the act of September 4, 1841, the first general pre-emption law granting to settlers on public domain the right to purchase land to the extent of one hundred and sixty acres each, in which it was provided in section 10 that no lands on which are situated any known salines or mines should be allowed entry under the provisions of the act. We do not, however, discover from these earlier statutes any definite light as to the meaning of the word "mineral" as the same is used in the grant to the Northern Pacific Railroad Company. In the pre-emption act of 1841, the reser-

vation was of lands on which are situated any known "sa-
104 lines or mines." In the act of September 27, 1850, commonly known as the donation act, the exception is of "mineral lands" and lands reserved for salines. What is meant by the term "mineral lands" is not defined in the act, but the act contains provisions stating that portions of the public lands which seem unfit for cultivation purposes may be surveyed into townships only. Subsequently Congress by statute repealed so much of the donation act as provided that none except township lines shall be surveyed where the lands are mineral, thus applying the term "mineral" to lands which seem unfit for cultivation. So the act of March 3, 1853, directing the survey of public lands in California provided that "none other than township lines shall be surveyed where the lands are mineral." The act of July 1, 1864, 13 U. S. Stat., 343, enacted one day prior to the date of the grant to the Northern Pacific Railroad Company, has been regarded as a legislative interpretation of the words "mines" and "mineral lands," as they had been used by Congress in prior legislation, and more especially in the pre-emption act of 1841. The act declared that "any tracts embracing coal beds or coal fields, constituting portions of the public domain, and which as 'mines' are excluded from the pre-emption act of 1841, and which under past legislation are not liable to ordinary private entry," might be offered at public sale. This legislation expresses the meaning of Congress in reserving "mines" in the pre-emption act. It declares that mines of coal, which is not a metallic substance and had not been specified in the reservations of gold, silver, copper, lead, etc., had been included in the word "mines" in the reservation of the pre-emption act. Mullan *v.* United States, 118 U. S., 271.

105 Contemporaneous construction of the word "mineral" by the executive officers whose duty it was to construe the land laws is, in a case of ambiguity, of persuasive force. U. S. *v.* Moore, 95 U. S., 760. Brown *v.* U. S., 113 U. S., 568. Pennoyer *v.* McConnaughy, 140 U. S., 23. Barden *v.* N. P. R. R. Co., 154 U. S., 288. In the case of W. H. Hooper, 1 L. D., 560, the Land Department approved the rule which had been promulgated in a circular from the General Land Office that "Whatever is recognized as a mineral by the standard authorities on the subject, where the same is found in quantity and quality to render the land sought to be patented more valuable on this account than for purposes of agriculture, should be treated as coming within the purview of the mining act of May 10, 1872." In Maxwell *v.* Brierly, 1 B. L. P., 98, it was held that land more valuable for its deposits of stone or whatever is recognized as mineral than for agriculture, is mineral land. In the case of H. P. Bennet, Jr., 3 L. D., 116, it was held that mountain land covered with granite cliffs and rocks the value of which was in the quarry in the face of the cliff was mineral land, and might be entered as a placer claim. This ruling was adhered to until 1891, when an apparent departure was made in the case of Conlin *v.* Kelly, 12 L. D., 1, where it was held that stone useful only for general building purposes does not except land from pre-emption entry. In that case, Kelly, the pre-emptioner, had made final payment for the land seven

years before Conlin filed his contest claiming that the land was valuable for mineral. Decision seems to have been controlled by that fact, together with the further fact as found by the Secretary that the stone in the tract in controversy had no peculiar property or characteristic to give it special value otherwise
106 than for general building purposes. But in McGlenn *v.* Wienbroeer, 15 L. D., 370, it was held that land which contains a valuable deposit of stone useful for special purposes, might be entered as a placer claim. The Secretary distinguished the case of Kelly *v.* Conlin, and declared that the ruling in that case rested upon equitable as well as legal considerations, and that the department declined to cancel an entry which had existed for seven years upon the plea that it was fraudulently made, on the ground that common building rock used for general purposes is mineral. Shortly after the decision of the case of Kelly *v.* Conlin, and apparently for the purpose of disapproving the rule there announced, and of reestablishing the former ruling of the Land Department, Congress enacted the law of August 4, 1892, permitting stone to be taken under the placer mining laws. In a case arising before the date of that law, South Dakota *v.* Vermont Stone Co., 16 L. D., 263, it was held, following Kelly *v.* Conlin, that lands chiefly valuable for ordinary building stone are not excepted as mineral lands from the grant to the State for school purposes. But in Van Doren *v.* Plested, 16 L. D., 508, it was held that land containing a deposit of sandstone of a superior quality for building and ornamental purposes, valuable only as a stone quarry, may be entered as a placer claim under the general mining laws. This also was held of an entry made prior to the act of 1892. In the case of Paris Gibson, *et al.*, 21 L. D., 329, it was held that land embraced within a placer entry of a tract chiefly valuable for ordinary building stone made in 1889 is excepted from the subsequent operation of the grant of school lands to the State.

In that case the Secretary declined to approve the ruling in the
107 case of South Dakota *v.* The Vermont Stone Co. In Pacific Coast Marble Co. *v.* N. P. R. R. Co., *et al.*, 25 L. D., 233, it was held that lands valuable only on account of the marble deposit contained therein did not pass to the Northern Pacific Railroad Company under its grant of July 2, 1864, but were subject to placer entry under the mining laws.

These rulings of the Land Department are, in the main, in harmony with the definition of the word "mineral" as the same is popularly and generally accepted. A mineral is defined by the Century Dictionary to be, "Any constituent of the earth's crust; more specifically, an inorganic body occurring in nature, homogeneous and having a definite chemical composition which can be expressed by a chemical formula, and further having certain distinguishing physical characters." Bainbridge on Mines, 4th ed., p. 1, defining the term "mineral" says: "The term may, however, in the most enlarged sense, be described as comprising all the substances which now form or which once formed a part of the solid body of the earth, both external and internal, and which are now destitute of or incapable of supporting animal or vegetable life. In

this view, it would embrace as well the bare granities of the mountains as the deepest hidden diamonds and metallic ores." There is authority in the earlier English decisions for holding that minerals signify that which is obtained from mines, from underground workings, as distinguished from that which is quarried. Davvell *v.* Roper, 24 L. J. Ch., 779. Rex *v.* Sedgley, 2 B. & Ad., 65. King *v.* Brettell, 3 B. & Ad., 424. But the weight of English authority includes under the term "mineral" that which is quarried as well as that which is obtained from mines. In Midland R'y Co.,
108 *v.* Checkley, L. R. 4 Eq., 19, Lord Romilly, M. R., held that stone was a mineral under a reservation of mines and minerals. He said: "Stone is, in my opinion, clearly a mineral; and in fact everything except the mere surface, which is used for agricultural purposes; anything beyond that which is useful for any purpose whatever, whether it is gravel, marble, fireclay, or the like, comes within the word "mineral' when there is a reservation of the mines and minerals from a grant of land." In Earl of Rosse *v.* Wainman, 14 M. & W., 859, Parke, B., said: "Beds of stone, which may be dug by winning or quarrying, are therefore properly minerals." Similar views are expressed in Midland R'y *v.* Hanchwood B. & T. Co., L. R. 20. Ch. D., 552, Micklethwaite *v.* Winter, 5 Eng. L. & Eq., 526, Hext *v.* Gill, L. R. 7 Ch. App., 699, Jamieson *v.* North British R'y Co., 6 Scot. L. Rep., 188, and The Attorney General *v.* Welch Granite Co., 35 W. R., 617. In the case last cited, it was held that the term "mineral" included granite. In Pennsylvania the ruling in Earl of Rosse *v.* Wainman was followed in Griffin *v.* Fellows, *et al.*, 81 Pa. St., 114, where it was said: "The term 'mineral' embraces everything not of the mere surface which is used for agricultural purposes; the granite of the mountain as well as metallic ores and fossils are comprehended within it." In Hartwell *v.* Cammon, 10 N. J. Eq., 128, it was held that paint stone found in strata below the surface of the soil is included in the terms "mines" and "minerals." Under the authority of these decisions and definitions, we entertain no doubt that in the reservation of mineral lands from the grant to the Northern Pacific Railroad Company the granite quarry in controversy was included.

But if indeed the reservation of mineral lands as the term
109 "mineral" was used and understood at the time of the grant to the Northern Pacific Railroad Company was insufficient to exclude from the grant lands valuable principally for granite quarries, Congress nevertheless retained the power to subsequently enlarge the reservation and make it more comprehensive at any time before rights were vested by the definite location of the road. The grant was a grant of lands that were not otherwise reserved or appropriated at the time of the definite location of the line of the road. Menotti *v.* Dillon, 167 U. S., 703. N. P. R. R. Co. *v.* Sanders, 49, Fed., 129, 134. In the case last cited, this court said: "Although there was no statute providing for the sale or bestowal of mineral lands at the time of the grant to plaintiff, Congress had the right to and did afterwards make such a law, and under it claims could be and were lawfully initiated prior to the definite fixing of the line of plaintiff's

road. We think that the reservations in the plaintiff's grant were made in contemplation of future legislation as well as the then existing laws." Soon after making the grant, Congress enacted the first mining act. 14 Stat at Large, p. 251. The first section provides: "That the mineral lands of the public domain, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and occupation by all citizens of the United States, etc." On May 10, 1872, it was enacted (17 Stat. at Large, p. 191), "That all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, etc." On June 3, 1878,
Congress enacted a law providing for the sale of lands valu-
110 able chiefly for timber or stone. 20 Stat. at Large, p. 89.
These statutes define the status of the mineral lands included within the territorial limits of the railroad grant at the time when the grant took effect, the date of the definite location of the road. The land in controversy was land valuable chiefly for stone, and as such was offered for sale.

The decree of the circuit court is affirmed.

(Endorsed:) "Opinion. Filed Oct. 1, 1900. F. D. Monckton, clerk."

111 United States Circuit Court of Appeals for the Ninth Circuit.

THE NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, etc., Appellant,
vs.
J. A. SODERBERG, Appellee. } No. 601.

Appeal from the circuit court of the United States for the district of Washington, northern division.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Washington, northern division, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said circuit court in this cause be, and the same is hereby, affirmed, with costs.

(Endorsed:) Decree. Filed and entered October 1, 1900. F. D. Monckton, clerk.

112 United States Circuit Court of Appeals for the Ninth Circuit.

NORTHERN PACIFIC RAILWAY COMPANY, Complainant and Appellant,
vs.
J. A. SODERBERG, Defendant and Appellee.

Petition for Appeal.

Now comes The Northern Pacific Railway Company, a corporation, appellant in the above-entitled cause, and conceiving itself aggrieved by the decree affirming the decree of the circuit court made and entered in the above-entitled cause on the 1st day of October, 1900, by the United States circuit court of appeals for the ninth circuit, doth hereby appeal from said decree of said United States circuit court of appeals for the ninth circuit to the Supreme Court of the United States. And this appellant prays that said appeal may be allowed and that a transcript of the record and proceedings herein and upon which said decree was made and entered, duly authenticated, may be transmitted to the United States Supreme Court.

C. W. BUNN,
JAMES B. KERR,
H. M. STEPHENS,
Solicitors for Complainant and Appellant.

Dated, January 7, 1901.

113 And now, to wit, on this 7th day of January, 1901, it is ordered that the above appeal in the above-entitled cause be and it is hereby allowed as prayed.

(Signed) WM. B. GILBERT,
Circuit Judge.

(Endorsed:) Petition for appeal and order. Filed Jan. 16, 1901. F. D. Monckton, clerk.

114 United States Circuit Court of Appeals for the Ninth Circuit.

NORTHERN PACIFIC RAILWAY COMPANY, Complainant and Appellant,
vs.
J. A. SODERBERG, Defendant and Appellee.

Assignment of Errors.

Comes now the above-named complainant and appellant, The Northern Pacific Railway Company, and makes and files the following assignment of errors upon which it will rely in its appeal from the decree of the court above named made and entered herein on the first day of October, 1900, as follows, to wit:

I.

The court erred in affirming the decrees of the circuit court made and entered in this cause on the 24th day of February and the 8th day of March, 1900.

II.

The court erred in not making and entering a decree in favor of the complainant and appellant, The Northern Pacific Railway Company, and against the defendant and appellee, J. A. Soderberg, and not granting an injunction restraining said appellee from in any manner interfering with the property described in the amended bill of complaint or taking granite therefrom without the consent of the appellant.

III.

115 The court erred in not making and entering a decree that the complainant and appellant was the owner of the property described in the amended bill of complaint.

IV.

The court erred in not making and entering a decree restraining the appellee from committing trespass upon the land described in the amended bill of complaint.

V.

The court erred in holding that the defendant and appellee J. A. Soderberg, is the owner of the alleged placer mining claims known as the "Linea" and "Lillie" and embracing a part of section 19, township 27, north of range 10 east of the Willamette meridian.

VI.

The court erred in holding that said J. A. Soderberg was entitled to have the title to said alleged mineral claims quieted and confirmed in him, and the said decree is erroneous in ordering and adjudging and decreeing the title of said mineral claims, or either of them or any part of either of them, quieted and confirmed in said J. A. Soderberg.

VII.

The court erred in holding that the bond given by the defendant and appellee J. A. Soderberg in the sum of five thousand dollars to secure the performance of the decree and the observance of the provisional injunction to be cancelled and discharged, and said decree is erroneous in ordering and decreeing said bond cancelled and for naught held.

VIII.

The court erred in holding and adjudging the defendant and appellee, J. A. Soderberg, entitled to recover costs herein and said decree is erroneous in adjudging and decreeing that the defendant

and appellee should recover of complainant and appellant costs, charges and disbursements herein.

116 IX.

The court erred in holding and deciding that the land involved herein is "mineral" land within the meaning of that certain act of Congress of the United States entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget's sound on the Pacific coast, by the northern route," approved July 2, 1864.

X.

The court erred in holding and deciding that the la described in the amended bill of complaint of complainant and appellant or any part thereof, to wit, an odd-numbered section within less than forty miles of the line of definite location and construction of the railroad of the Northern Pacific Railroad Company, a corporation created under the laws of Congress, was subject to entry or acquisition as stone land or as a placer mineral claim, or subject to entry in any manner whatsoever.

XI.

The court erred in dismissing the bill of complaint of complainant, and the decree is erroneous in so ordering and adjudging.

Wherefore, the complainant and appellant, The Northern Pacific Railway Company, prays that the said decree of the circuit court of appeals of the United States for the ninth circuit be reversed, with directions to render and enter a decree in favor of complainant and appellant and against defendant and appellee in accordance with the prayer for this appeal and the prayer of the amended bill of complaint in this cause.

C. W. BUNN,
JAMES B. KERR,
H. M. STEPHENS,
Solicitors for Complainant and Appellant,
Northern Pacific Railway Company.

117 (Endorsed:) Assignment of errors. Filed Jan. 16, 1901. F. D. Monckton, clerk.

118 United States Circuit Court of Appeals for the Ninth Circuit.

NORTHERN PACIFIC RAILWAY COMPANY, Complainant and Appellant,
vs.
J. A. SODERBERG, Defendant and Appellee.

Order Fixing Amount of Appeal Bond.

The complainant and appellant, The Northern Pacific Railway Company, having this day filed its petition for appeal from the de-

cree made and entered herein on the first day of October, 1900, to the Supreme Court of the United States, together with an assignment of errors in due form, and said petition and appeal having this day been allowed,

Now therefore it is ordered that the appeal bond herein be and is hereby fixed at the sum of five hundred dollars ($500.00) conditioned and to the effect that the said Northern Pacific Railway Company, complainant and appellant, shall prosecute its said appeal to effect, and shall answer all damages and costs that may be awarded against it if it shall fail to make its plea and appeal good. Said bond and security to be approved by the above-named court or a judge thereof.

(Signed) WM. B. GILBERT,
Circuit Judge.

Dated, January 7, 1901.

(Endorsed:) Order fixing amount of appeal bond. Filed Jan. 16, 1901, F. D. Monckton, clerk.

119 United States Circuit Court of Appeals for the Ninth Circuit.

NORTHERN PACIFIC RAILWAY COMPANY, Complainant and Appellant,
vs.
J. A. SODERBERG, Defendant and Appellee.

Bond on Appeal.

Know all men by these presents, that we, the Northern Pacific Railway Company, a corporation, as principal, and John L. Roberts and A. F. Albertson of the city of Tacoma and State of Washington as sureties, are held and firmly bound unto J. A. Soderberg in the full and just sum of five hundred dollars ($500.00) to be paid to the said J. A. Soderberg, his attorneys, executors, administrators or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 7 day of January in the year of our Lord one thousand nine hundred and one.

Whereas, lately at a session of the circuit court of appeals of the United States for the ninth circuit, in a suit pending in said court between the said Northern Pacific Railway Company, complainant and appellant, and J. A. Soderberg, defendant and appellee, a decree was rendered against the said Northern Pacific Railway Company, and the said Northern Pacific Railway Company having obtained from said court an order allowing an appeal to the Supreme Court
of the United States to reverse the decree so entered in the
120 aforesaid suit, and a citation directed to the said J. A. Soderberg is about to be issued citing and admonishing him to be and appear at the United States Supreme Court at the city of Washington in the District of Columbia,

Now therefore, the condition of the above obligation is such that if the said Northern Pacific Railway Company shall prosecute its said appeal to effect and shall answer all damages and costs that may be awarded against it if it fails to make its plea good, then the obligation is to be void, otherwise to remain in full force and virtue.

NORTHERN PACIFIC RAILWAY COMPANY,

[SEAL.] By C. S. MELLEN, *President.* [SEAL.]
JOHN L. ROBERTS.
A. F. ALBERTSON.

Attest: R. H. RELF,
Assistant Secretary.

STATE OF WASHINGTON, } ss:
County of Pierce, }

John L. Roberts and A. F. Albertson, being first duly sworn, on oath, each for himself, deposes and says: That he is a resident and freeholder in the district of Washington, and that he is worth the sum mentioned in the foregoing bond and obligation over and above all just debts and liabilities and exclusive of property exempt from execution in property situated in the State of Washington.

JOHN L. ROBERTS.
A. F. ALBERTSON.

Subscribed and sworn to before me this 7 day of January, 1901.

A. G. AVERY,
Notary Public Residing at Tacoma, Washington.

121 The foregoing bond and sureties therein are hereby approved this 7th day of January, 1901.

(Signed) WM. B. GILBERT,
Circuit Judge.

(Endorsed:) Bond on appeal. Filed Jan. 16, 1901, F. D. Monckton, clerk.

122 United States Circuit Court of Appeals for the Ninth Circuit.

THE NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, etc., Appellant,
vs.
J. A. SODERBERG, Appellee. } No. 601.

Certificate of Clerk C. C. A. to Transcript.

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, do hereby certify the foregoing one hundred and twenty-one (121) pages, numbered from one (1) to one hundred and twenty-one (121), inclusive, to be a true copy of the record, and of the assignment of errors, and of all proceedings in said United States circuit court of appeals, including the opinion filed, in the above-entitled case, as the same remain and appear of record in my office, and that the same, together, constitute the tran-

script of record on appeal to the Supreme Court of the United States herein.

Attest my hand and the seal of said United States circuit court of appeals for the ninth circuit, at San Francisco, California, this 18th day of February, A. D., 1901.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

{ Ten-cent United States internal-revenue stamp, canceled Feb. 25, 1901. F. D. M., c'k. }

123 United States Circuit Court of Appeals for the Ninth Circuit.

NORTHERN PACIFIC RAILWAY COMPANY, Complainant and Appellant,
vs.
J. A. SODERBERG, Defendant and Appellee.

Citation.

UNITED STATES OF AMERICA, *ss:*

To J. A. Soderberg, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be holden at the city of Washington in the District of Columbia, within sixty days from the date hereof, pursuant to an appeal duly taken and allowed from that certain decree of the United States circuit court of appeals for the ninth circuit in that certain cause wherein The Northern Pacific Railway Company is complainant and appellant and you, the said J. A. Soderberg, are defendant and appellee, to show cause, if any there be, why the order and decree of affirmance in the said appeal mentioned should not be set aside and corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 7 day of January 1901.

WM. B. GILBERT,
Circuit Judge.

124 Due and regular service of the foregoing citation by receipt of a true copy thereof, is hereby admitted this 10th day of January 1901 at Seattle Wash.

BALLINGER, RONALD & BATTLE,
Solicitors for J. A. Soderberg.

125 [Endorsed:] Copy No. 601. U. S. circuit court of appeals for ninth circuit Northern Pacific R'y Co. appellant *vs.* J. A. Soderberg appellee Citation Filed Jan. 16 1901 F. D. Monckton, clerk C. W. Bunn, James B. Kerr & H. M. Stephens att'ys for app'll'ts.

Endorsed on cover: File No. 18,083. U. S. C. C. of appeals, 9th circuit. Term No. 278 The Northern Pacific Railway Company appellant, *vs.* J. A. Soderberg Filed March 18, 1901.

NOV 9 1901
JAMES H. McKENNEY,

Filed Nov. 9, 1901.

Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 273.

NORTHERN PACIFIC RAILWAY COMPANY,
Appellant,

vs.

J. A. SODERBERG.

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF FOR APPELLANT.

C. W. BUNN,
JAMES B. KERR,
Counsel.

Supreme Court of the United States.

NORTHERN PACIFIC RAILWAY COMPANY,
Appellant,

vs.

J. A. SODERBERG.

Statement.

This is an appeal from the Circuit Court of Appeals of the Ninth Circuit. That court affirmed the decree of the Circuit Court for Washington, the suit having been brought in the latter court by the appellant for an injunction restraining J. A. Soderberg from quarrying and removing granite from a piece of land in the state of Washington.

The jurisdiction of the Circuit Court depended (at least this was one ground on which the jurisdiction was based in the bill of complaint) on a

federal question; the appellant has no patent and bases its title and right on the Northern Pacific grant, viz: the act of Congress of July 2, 1864. Soderberg claims the land under the mineral laws of the United States. The controversy depends solely on the interpretation and effect to be given the railroad grant; the case involves over $5,000.00 (transcript, p. 30): it is therefore within the jurisdiction of this court under the act of 1891.

The question in the case is, whether land containing a granite quarry is "mineral" within the true meaning of the Northern Pacific grant, so as not to pass thereby. If it is "mineral" within the proper interpretation of that grant, the appellant has no title; but if not the appellant must succeed and the decrees below be reversed.

After bill, cross-bill, answers and replication had been filed, the case was tried upon an agreed statement, which shows the facts to be as below (transcript, pp. 24 to 33).

The appellant *Railway* company is the successor in title, by virtue of certain foreclosure proceedings and judicial conveyances, of the Northern Pacific *Railroad* company. Section 3 of the grant to the latter company, act of Congress July 2, 1864, says:

> *And be it further enacted,* that there be, and hereby is, granted to the "Northern Pacific Railroad Company," its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions

of war, and public stores, over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from preemption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land-office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or preempted or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the secretary of the interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections: *Provided*, that if said route shall be found upon the line of any other railroad route to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act: *Provided, further*, that the railroad company receiving the previous grant of land may assign their interest to said "Northern Pacific Railroad Company," or may consolidate, confederate, and associate with said company upon the terms named in the first section of this act. *Provided, further*, that all mineral lands be, and the same are hereby, excluded from the operation of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands, in odd numbered sections, nearest to the line of said road may be selected

> as above provided: *And provided, further*, that the word "mineral," when it occurs in this act, shall not be held to include iron or coal: *And provided, further*, that no money shall be drawn from the treasury of the United States to aid in the construction of the said "Northern Pacific Railroad."

Sec. 2 contains language to be considered, viz:

> "The right, power and authority is hereby given to said corporation to take from the public lands adjacent to the line of said road materials of earth, stone, timber and so forth, for the construction thereof."

The company complied with the conditions of the act. Prior to March 26, 1884, it surveyed and definitely located its road opposite the land in question, and afterward completed the same. On the 23rd of April, 1884, the president accepted as provided in the act this portion of the road (transcript pp. 28, 29).

At the date of the grant and at the date of such definite location the land in question was public land of the United States to which no claims or rights had attached (transcript pp. 28, 29).

The land is within the *place* limits of the grant (transcript, p. 28).

It is rough and mountainous and its principal value consists in a ledge of granite running through it, which granite is of a good merchantable quality, capable of being quarried and valuable for building stone (transcript p. 30).

Soderberg bases his claim upon entries of this

granite ledge under the mining laws of the United States. His entries were made on or about the 16th day of April, 1897, thirteen years after the appellant's rights (if it had any) had become fixed. It is conceded that, if the land was subject to such entries, his proceedings were valid and regular, though this is not important, the whole question being whether *appellant* had the title—*whether the land is included under the terms of conveyance in the grant.*

Assignment of Error.

The courts below erred in holding that the land was "mineral" and for that reason not embraced in the conveyance made by said act of Congress.

Argument.

*

Though sometimes mineral land is spoken of as being *excepted*, the expression is not accurate. The act says, "public land, not mineral." *Mineral land is not within this description.* Unlike land to

which claims have attached (which might pass under the grant were they not excepted), mineral land cannot pass; this whether claims have attached to it or not, and regardless of its proximity to market or commercial value. Therefore if granite ledges, beds of limestone, sandstone or slate, beds of clay or sand are "mineral" within the meaning of the grant, they do not pass. They do not pass though no one claims them under a law of Congress, and though their remoteness and inaccessibility may render it morally certain that they will never be used commercially. This applies to the general rock foundations of the whole country within the grant. If granite and other quarryable rocks are not such mineral as Congress intended, they pass under the grant without regard to their being accessible to transportation lines, and close enough to market to make them valuable for building purposes. And if they are not mineral the company is obliged to accept them. But if they are mineral the company can decline to accept the vast areas of desolate and barren rocks within its grant and take in lieu agricultural lands under the *proviso* of the third section.

The learned Circuit Court of Appeals applied the Century Dictionary definition of mineral, "Any constituent of the earth's crust," etc.; also that of Bainbridge on Mines, "All the substances which now form, or which once formed a part of the solid body of the earth" (transcript p. 55).

Undoubtedly a geologist or chemist speaks of "mineral" meaning whatever is not animal or veg-

etable, that is, all inorganic bodies even to liquids and gases.

But it needs no argument to show that such definitions are unsound, for they destroy the grant. The main constituents of the soil including sand and clay are minerals in the scientific sense.

Evidently some other definition must be applied. Congress used the term mineral in a popular sense. In that sense mineral is what is *mined*. Webster defines a mine as "a pit or excavation in the earth from which metallic ores or other mineral substances are taken by digging; distinguished from the pits from which stones only are taken, and which are called quarries." He says under the word quarry, "a place, cover or pit where stones are cut from the earth for building or other purposes. The word mine is generally applied to the pit from which are taken metals and coals." See also Century Dictionary word "mine."

That Congress in this land grant act and in prior laws, as well as in subsequent laws, has used the term "mineral land" as including the metaliferous minerals only, will be made clear by a review of the legislation. In no case are non-metal bearing rocks mentioned as "mineral," and the laws bear evidence that Congress did not intend to include the common rocks of the country when legislating touching minerals.

Miscellaneous land laws.

The first reference in national legislation to the mineral deposits of the country is found in ordinance of May 20th, 1785, for the disposal of land in the "western territory." That ordinance reserved "one-third part of all gold, silver, lead and copper mines, to be sold, or otherwise disposed of, as Congress shall hereafter direct."

April 16, 1800 (2 Stat. 87), Congress authorized the president to collect information relative to the copper mines on the south side of Lake Superior.

By act of March 3, 1807 (2 Stat. 448), Congress provided for the sale of certain lands in the present states of Ohio and Indiana, but provided that lead mines should be reserved for future disposition. By the same act the president was authorized to lease the lead mines. This inaugurated the policy of the United States of leasing mineral lands.

March 26, 1816 (3 Stat. 260), it was enacted that the public lands might be leased under certain conditions, but that no lease should be granted for a lead mine or salt spring without the approval of the president.

In various other acts Congress provided for the sale and disposal of public lands, excepting lead mines and salines. See act approved

June 15, 1809,	(2 Stat. 548).
February 15, 1811,	(2 Stat. 617).
March 3, 1811,	(2 Stat. 662).
May 6, 1812,	(2 Stat. 728).
February 17, 1815,	(3 Stat. 211).
March 5, 1816,	(3 Stat. 256).
March 25, 1816,	(3 Stat. 260).
April 27, 1816,	(3 Stat. 319).
April 29, 1816,	(3 Stat. 332).

March 3, 1829 (4 Stat. 364), Congress conferred authority on the president to sell the reserved lead mines and contiguous land in the state of Missouri.

September 4, 1841 (5 Stat. 453), the first general preemption law was passed granting settlers certain preference rights of purchase to the extent of 160 acres each. Section 10 of this act provided:

"No lands on which are situated any known salines or mines shall be liable to entry under and by virtue of the provisions of this act."

July 11, 1846 (9 Stat. 37), Congress ordered "the reserved lead mines and contiguous lands in the states of Illinois and Arkansas and of Wisconsin and Iowa" to be exposed to sale at a minimum price of $2.50 per acre.

March 1, 1847 (9 Stat. 146), Congress created the Lake Superior land district in the upper peninsula of Michigan, and by section 2 directed that the president should cause such of said lands "as may contain copper, lead or other valuable ores" to be exposed to sale at a minimum price of $5 per acre.

The act of March 3, 1847 (9 Stat. 179), organizing the Chippewa land district in Wisconsin provided like terms for the disposal of mineral land therein.

The act of September 26, 1850 (9 Stat. 472), reduced the price of mineral lands in the two districts last referred to.

September 27, 1850 (9 Stat. 496), Congress passed an act applicable to Oregon, commonly known as the "Donation act," and provided (sec. 14) "that no mineral lands, nor lands reserved for salines, shall be liable to any claim under and by virtue of the provisions of this act."

February 14, 1853 (10 Stat. 158), Congress amended the Donation act, by authorizing the president to offer at public sale certain lands in Oregon west of the Cascade mountains, "excepting mineral lands."

The act of March 3, 1853 (10 Stat. 244), providing for survey of public lands in California, said that none other than township lines should be surveyed where the lands were mineral, and section 6 subjected all the public lands of the state to the preemption law, with the exception of lands claimed under foreign grant or title, "and the mineral lands." Sections 12 and 13 granted certain lands to the state for public purposes, and from each of these grants mineral lands were excluded.

The act of July 22, 1854 (10 Stat. 308), established the office of surveyor general of New Mexico, Kansas and Nebraska, and granted donations to actual settlers, and provided (sec. 4) that none of its terms should "extend to mineral or school lands, salines," etc.

The Union Pacific grant of July 1, 1862 (12 Stat. 489), provided, "all mineral lands shall be excepted from the operation of this act."

The act of July 2, 1862 (12 Stat. 503), granting lands to the several states for agricultural colleges, provided "that no mineral lands shall be selected or purchased under the provisions of this act."

The act of July 1, 1864 (13 Stat. 343), says "that where any tracts embracing coal beds or coal fields constituting portions of the public domain, and which as 'mines' are excluded from the preemption act of eighteen hundred and forty-one," it shall be lawful for the president to offer such tracts for sale.

There can, we submit, be no doubt that under the preemption law of 1841, and under the grants to states for school, college purposes, and the like, lands containing granite or other rock could be acquired by preemption, or would pass to the state under the act in its favor. Throughout all these acts the term "mineral land" is used as embracing only land capable of being "mined" in the ordinary

and popular sense, and not land capable of being "quarried."

The reservation of "mines" in the preemption law of 1841 was no doubt intended by Congress to be identical with the reservation of "mineral land" in the railroad land grants. No reason has been suggested, and probably cannot be, why the exception in the two cases should differ. The use of the term "mines" in the preemption law was interpreted by the interior department as not excluding stone lands from acquisition under that law. See the case of *Elias Jacob*, 7 Copp's Land Owner, 83, and *Conlin v. Kelly*, 12 L. D. 1. In the preemption law the term "mines" clearly did not bear the definition given by the court below to the term "mineral land," namely, all substances treated of in standard works on mineralogy. The use of the word "salines" shows this, for salt is confessedly a mineral within the scientific definition. But evidently Congress supposed that the term "mines" did not include salt, because salines were specially excepted.

This court treated the exception of mines in the preemption law, and mineral lands from grants both to states and to railroads, as synonymous in *Davis v. Weibbold*, 139 U. S. 507, where the court says:

> "The exceptions of mineral lands from preemption and settlement and from grants to states for universities and schools, for the construction of public buildings, and in aid of railroads and other works of internal improvement, are not held to exclude all lands in which

> minerals may be found, but only those where the mineral is in sufficient quantity to add to their richness and to justify expenditure for its extraction, and known to be so at the date of the grant."

The act of March 3, 1853, extended the preemption laws to California and excepted the "mineral lands." It cannot we think be claimed that the excepting clause of this act had any different meaning from the word "mines" used in the preemption law. Certain grants to the state were also made in this act from which mineral lands were excepted. After the passage of the California act, instructions were issued by the department thereunder (1 Lester's Land Laws, 698, par. 8) in which the term "mineral lands" is construed as "all lands on which are situated any known salines or mines." Thus the exact words of the preemption law constitute the departmental construction of the term "mineral lands" as used in the act of 1853. That construction has remained for almost 50 years.

Railroad Grants.

Considering next the railroad grants passed by Congress, it may be a common impression that all such grants contained an exception of mineral land, but this is far from the fact. Most of them contained no such exception. Examination of them

will demonstrate, *that where the grant extended through a country not supposed to contain the precious metals, the grant contained no exception of mineral, and only those grants contained such exceptions which extended through a country known or supposed to be valuable for the precious metals.*

The following railroad grants contained no exception of mineral lands:

Act of September 20, 1850 (9 Stat. 466), granting lands to Illinois, Mississippi and Alabama.

Act of June 10, 1852 (10 Stat. 8), granting lands to the state of Missouri.

Act of February 9, 1853 (10 Stat. 153), granting lands to Missouri and Arkansas.

Act of May 15, 1856 (11 Stat. 9), granting lands to Iowa.

Act of May 17, 1856 (11 Stat. 15), granting lands to Florida and Alabama.

Act of June 3, 1856 (11 Stat. 17), granting lands to Alabama.

Act of June 3, 1856 (11 Stat. 21), granting lands to the state of Michigan.

Act of June 3, 1856 (11 Stat. 20), granting lands to the state of Wisconsin.

Act of June 3, 1856 (11 Stat. 18), granting lands to the state of Louisiana.

Act of August 11, 1856 (11 Stat. 30), granting lands to the state of Mississippi.

Act of March 3, 1857 (11 Stat. 195), granting lands to the state of Minnesota.

Act of March 3, 1865 (13 Stat. 526), granting lands to the state of Minnesota.

Act of May 12, 1864 (13 Stat. 72), granting lands to the state of Minnesota.

Act of March 3, 1863 (12 Stat. 772), granting lands to the state of Kansas.

Act of May 12, 1864 (13 Stat. 72), granting lands to the state of Iowa.

Act of July 4, 1866 (14 Stat. 87), granting lands to the state of Minnesota.

Act of July 23, 1866 (14 Stat. 210), granting lands to the state of Kansas.

Act of June 3, 1856 (11 Stat. 17), granting lands to the state of Alabama.

Act of June 3, 1856 (11 Stat. 18), granting lands to the state of Louisiana.

Act of August 11, 1856 (11 Stat. 30), granting lands to the states of Mississippi, Alabama and Louisiana.

Act of March 3, 1857 (14 Stat. 83), granting lands to the state of Alabama.

In the acts just cited Congress provided for the construction of 61 railroads, and in none is there found an exception of mineral lands. Among all the grants made by Congress for the construction of railroads, we believe that the following only contain an exception of mineral lands, to-wit:

Act of July 1, 1862 (12 Stat. 489), to the Union and Central Pacific railroad companies, and the act amendatory thereof of July 2, 1864 (13 Stat. 356).

Grant of May 5, 1864 (13 Stat. 66), to the state of Wisconsin for railroads running to Lake Superior.

Grant of May 5, 1864 (13 Stat. 64), to the state of Minnesota for the Lake Superior & Mississippi Railroad company (now St. Paul & Duluth).

Grant of July 2, 1864 (13 Stat. 365), to the Northern Pacific company.

Grant of July 25, 1866 (14 Stat. 239), to the California and Oregon and the Oregon Central companies.

Grant of July 27, 1866 (14 Stat. 292), to the Atlantic & Pacific and the Southern Pacific companies.

Grant of May 4, 1870 (16 Stat. 94), to the Oregon Central company.

Grant of March 3, 1871 (16 Stat. 573), to the Texas Pacific company.

Grant of July 4, 1866 (14 Stat. 83), to the state of Missouri for the St. Louis & Iron Mountain railroad.

Grant of July 13, 1866 (14 Stat. 94), to the Placerville & Sacramento Railroad company in California.

Grant of March 2, 1867 (14 Stat. 548), to the Stockton & Copperopolis Railroad in California.

The reason for the exception of minerals in each of these acts is found in the history of the particular grant in question. As to the Pacific roads a general and sufficient reason existed, which was that all of them were to cross the mountain ranges of the west, known at the time to contain precious metals in great quantities. A large proportion of the grants to all the Pacific roads lay in mountainous country which would prove valuable mainly by its production of precious metals.

The mineral exception in the grant to the state of Wisconsin of May 5, 1864, is explained by the then well known existence of copper mines along the probable line of the road. The existence of vast deposits of copper along the southern shore of Lake Superior was reported by Jonathan Carver, in the latter part of the eighteenth century, in his "Three Years' Travel in America," vol. 1.

The exception of mineral lands from the grant to Minnesota of May 5, 1864, which was only one of a large number of grants to that state, is explained by the Lake Superior & Mississippi road being projected through the iron region tributary

to Lake Superior. During the debate on this bill Senator Doolittle called the attention of the senate to the fact that some of the best iron mines of the world were within 15 miles of Lake Superior. Cong. Rec. First Session, 38th Cong., part 2, p. 965. He also stated that there were copper mines 15 miles south of Lake Superior producing as high a percentage of copper as those of the peninsula of Michigan. After this announcement Senator Harlan (p. 1030) moved to amend the bill by inserting in the first section the words "not mineral," and this amendment was adopted.

The reservation in the grant to Missouri, *supra*, is accounted for by the existence of well known lead mines and of iron in that state, as to which lead mines Congress had already legislated in the act of March 3, 1829 (4 Stat. 364).

The other acts containing a mineral exception are those for railroads in California and Oregon. The acts were passed after the discovery of gold in these states, and at a time when it was known that they were rich in precious metals.

In the grant of July 13, 1866 (14 Stat. 94), for the Placerville road, *supra*, the grant was of land "not containing gold or silver."

In the Stockton & Copperopolis grant of March 2, 1867 (14 Stat. 548), the proviso was "that all lands containing gold or silver or copper be, and the same are hereby, excluded."

In these railroad grants we have the strongest and plainest legislative construction of the term "mineral land." If Congress had supposed for a moment that stone land was "mineral land," no reason is apparent why the exception should not have been incorporated in all the grants. There could be no more conclusive demonstration of what Congress meant, than the fact, that in every grant through a country not supposed to contain the precious metals no mention was made of mineral land, while in every grant through a country known or generally supposed to contain the precious metals mineral lands were excluded.

This applies with especial emphasis to the state of Minnesota. Among the numerous grants made to that state, not one, except the grant of March 5, 1864, for the benefit of the present St. Paul & Duluth road, which penetrated the iron and copper of Lake Superior, contained any reference to mineral land. The remaining portion of the state was not supposed to contain mineral, and so far as is now known it does not.

But when these grants were passed, the remaining portion of Minnesota, as well as the states Wisconsin, Illinois, Indiana, Missouri, Kansas, Arkansas, Alabama, Florida, Louisiana, and the other states mentioned in the acts, contained large and numerous deposits of stone; and it must have been contemplated by Congress that these grants would convey many valuable stone deposits and quarries.

School Grants.

The action of Congress in making grants to the various states for school purposes evidences the same policy. In states not known as mining states when the grants were passed, no exception of mineral lands was made. The following grants contain no such exception:

Ohio—March 3, 1803.....	2 Stat. 225
Indiana—April 19, 1816.....	3 Stat. 289
Illinois—April 18, 1818	3 Stat. 430
Missouri—March 6, 1820	3 Stat. 455
Alabama—March 2, 1819	3 Stat. 489
Michigan—June 23, 1836	5 Stat. 59
Arkansas—June 23, 1836	5 Stat. 58
Wisconsin—August 6, 1846	9 Stat. 56
Minnesota—February 26, 1857..	11 Stat. 166
Kansas—January 29, 1861	12 Stat. 126

It was well known when these grants were passed that all these states contained valuable deposits of stone.

When Congress came to make a grant for school purposes to the state of *California*, it provided that mineral lands should be excepted from the grant (act March 3, 1853, 10 Stat. 244). The same is true of a similar grant to the state of *Colorado* (March 3, 1875, 18 Stat. 474). Is it to be supposed that Congress intended to grant stone lands to the states of Ohio, Indiana, Illinois, Missouri, Alabama, Michigan, Arkansas, Wisconsin, Minnesota

and Kansas, but to reserve stone out of the lands granted to California and Colorado?

This question has been expressly passed upon in *Wheeler v. Smith*, 5 Wash. 704. The school land grant to that state excepted "all mineral land." The court held that this exception did not include lands chiefly valuable for stone upon which no deposits of the precious metals existed.

Whatever conflict may be found in department rulings, one feature of practical construction should be conclusive. Millions of acres have been patented under grants which reserve mineral. The department has required the field notes of surveys to specify the character of the land, and has in many ways and at all times exercised many precautions against issuing under such grants patents for land containing minerals; but there is no evidence, either in laws, or in circulars, or doings of the department, that stone land has not been regarded as passing under every grant we have referred to. To the Northern Pacific alone there have been patented over twenty-four million acres. Much of this land, as well as of the land patented under the other grants, contains stone, or clay, or sand, or other mineral which gives, or may at some time give, more value to the land than its use for agriculture. This

universal understanding and practice is erroneous if the court below is correct. For it is not the filing of a claim which can exclude land under the mineral exception. As before pointed out, mineral does not pass under the grant regardless of claims. What is the result? Not only has the department improperly made us patents for a great and indeterminable amount of land, but something like nineteen million acres remain to be patented; this lies mostly in the unsurveyed mountainous regions of Montana, Idaho and Washington. Will the court lay down a doctrine here which will enable the grantee to refuse the barren granite mountains because they are mineral and claim in lieu agricultural land?

The first general act for the disposition of mineral lands was that of July 26, 1866 (14 Stat. 251). It provided for the sale and disposition of lands containing "a vein or lode of quartz, or other rock in place, bearing gold, silver, cinnabar or copper." It is very plain that in no case could a deposit of building stone be disposed of under the terms of this act. Following, as it did, so closely on the Pacific railroad grants of 1862 and 1864, and the act being applicable for the most part to the general region of country traversed by those grants,

it is well-nigh conclusive that the "mineral" which had been retained out of those grants was the very kind of land to be disposed of under the act of 1866.

The act of 1866 declares "all mineral lands" open for exploration and occupation under the law, and provides for the entry and patenting of rocks bearing gold, silver, cinnabar or copper. What was to be patented under this law is clearly the same as what was open for exploration and occupation, and therefore the term "mineral lands" is defined in this very act as being lands bearing gold, silver, cinnabar or copper. The act clearly did not embrace the ordinary rock formations of the country.

In the instructions of the department it is said (2 Lester, 334):

> "Timber lands on rocky hills and mountains, not known to contain any of the aforesaid minerals, will be designated as 'agricultural,' and if the contrary, as 'mineral'."

Another paragraph of these instructions is this:

> "If it is occupied as a mine, or if a vein of quartz or other rock in place, bearing gold, silver, cinnabar, or copper, has there been traced, it is mineral land; but if it has no existing mine upon it, and no metalliferous vein of quartz or other rock is known to pass through or penetrate the tract, the land is not properly classed as mineral, although, contrary to present indications, gold, silver, cinnabar, or copper may at some future time be discovered upon it."

In 1866 this act was construed by the department (2 Lester 328), where it is said:

> "The testimony shows that no mine of gold, silver, cinnabar, or copper exists upon this land, but a sulphur spring is situated thereon. This office does not regard sulphur springs as saline or mineral, so as to come within the inhibition of the statutes excluding mineral and saline lands from pre-emption entry or scrip location."

The act of 1866 applied only to veins or lodes in place, and this was amended by the act of July 9, 1870 (16 Stat. 217), which provided that "claims usually called 'placers,'" including all forms of deposit, excepting veins of quartz or other rock in place, should be subject to entry and patent under like terms and conditions and on similar proceedings, as in the case of vein or lode claims. "Placer" is a Spanish word allied to the word "plaza" and means a place near a river where gold dust is found. In mining, a place where the superficial detritus is washed for gold or other valuable minerals. (Century Dictionary, also Webster's Dictionary). "Placers are superficial deposits, which occupy the beds of ancient rivers or valleys." *Moxon v. Wilkinson*, 2 Mont., 421. In short, "placer" means soil containing precious metals washed down by the elements from some vein or lode in place. It is little short of absurd to say that a bed or ledge of rock in place not bearing metal and fit only to be quarried for building stone is a "placer."

This court in *United States v. Iron Silver Mining Company*, 128 U. S. 673, defined a "placer," and

described those deposits which could be acquired under the mining laws of the United States, as follows:

> "By the term 'placer claim,' as here used, is meant ground within defined boundaries which contains *mineral* in its earth, sand or gravel; ground that includes valuable deposits not in place, that is, not fixed in rock, but which are in a loose state, and may in most cases be collected by washing or amalgamation without milling. By 'veins or lodes,' as here used, are meant lines or aggregations of *metal* embedded in quartz or other rock in place. The terms are found together in the statutes, and both are intended to indicate the presence of metal in rock."

On May 10, 1872 (17 Stat. 90), Congress passed an act providing, "all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found, to occupation and purchase * * * under regulations prescribed by law and according to the local customs or rules of miners in the several mining districts." We submit that the term "mineral deposits," and the phrase "according to the local customs or rules of *miners*," indicate that Congress did not intend to make a law for the disposition of stone quarries. The act provides for disposition under and in accordance with local customs and rules of "miners." We apprehend there were no settled local rules and customs of "quarryers," and at least Congress did not intend to include them by the word "miners."

But even if ordinary rock formations may be

taken up as mineral deposits under this act, that would not tend to show that Congress in 1864, in passing the Northern Pacific grant, intended to reserve stone.

Subsequently Congress, on June 3, 1878 (20 Stat. 89), passed an act applicable to stone, which reads:

> "All lands valuable chiefly for stone may be sold on the same terms as timber lands, provided that nothing herein contained shall defeat or impair any *bona fide* claim under any law of the United States, or authorize the sale of any mining claim or the improvements of any *bona fide* settler, or lands containing gold, silver, cinnabar, copper, or coal."

This act, it seems to us, is a conclusive declaration by Congress that the disposal of stone was not intended to be provided for under the acts of 1866, 1870 and 1872. The fact that Congress deemed it necessary to provide in 1878 for the disposal and acquisition by settlers of stone quarries, seems to us conclusive that the previous laws had not covered the subject. *McFadden v. Mountain View Company*, 97 Fed. Rep., 670.

On August 4, 1892 (27 Stat. 348), Congress passed the first and only act authorizing the location of stone under the mining laws. The passage of this act can be explained only on the theory that Congress in 1892 regarded stone as not capable of acquisition under the mining laws previously passed. The passage of the act is a legislative declaration to that effect. *Clark v. Erwin*, 16 L. D. 122, decided 1893; *Hayden v. Jamison*, 16 L. D. 537.

There is considerable conflict in the decisions of the department. In 1883, in case of *W. H. Hooper*, 1 L. D. 571, Secretary Kirkwood held that gypsum could be acquired under the act of 1872 as "a valuable mineral deposit." Secretary Teller in the same year issued a circular extending the mining regulations of October 30, 1881, to valuable deposits of borax, soda, sulphur, alum and asphalt in certain states and territories (1 L. D. 572), and held in the case of *Dobbs Placer Mine* (1 L. D. 578), that kaolin or fire clay was subject to a placer location.

But Secretary Vilas held in *Dunluce Placer Mine*, June 4, 1888 (6 L. D. 761), that a deposit of "brick clay" was not mineral within the mining laws, and not subject to entry as a placer claim.

In 1891, in *Conlin v. Kelly* (12 L. D. 1), it was held that a species of granite called jasper, valuable for building, was not mineral so as to be capable of location under the mining laws. Assistant Secretary Chandler says in that case:

> "Congress seems to have recognized the fact that a stone quarry is not a 'placer mine' and it passed an act June 3, 1878 (20 Stat. 89). providing for timber and stone entries."

To the same effect is *Clark v. Erwin*, 16 L. D.

122, decided in 1893, where Secretary Noble held (a) that land chiefly valuable for building stone is not by that fact excluded from the settlement laws; (b) that prior to the act of August 4, 1892, there was no authority for a placer location on land chiefly valuable for building stone. The same ruling was made by Secretary Smith, *Hayden v. Jamison*, 16 L. D. 537.

In *Gary v. Todd*, 18 L. D. 58, Secretary Smith held that land chiefly valuable for phosphates in Florida could be taken under the mining laws, while in *Jordan v. Mining Company*, 20 L. D. 500, he held that fire clay, valuable for the manufacture of pressed brick, could not be taken under the mining laws.

Perhaps it is not possible to reconcile all these decisions, at least it is not necessary for us to attempt to do so. Whether or not fire clay, borax, soda, sulphur, alum and asphalt were properly held by the interior department to be subjects of claim under the mineral laws, it is apparent from these decisions that the general rule of the department was against granite, or any other ordinary building stone, being capable of acquisition under those laws. Moreover, it is clear from these decisions that lands containing building stone could be acquired under the pre-emption laws, which, as we have shown, excepted "mines."

However, in none of the cases above cited was the interpretation of the term "mineral" in a railroad grant involved. On August 5, 1880, this question was presented with respect to the Southern Pacific grant. It was ruled in the case of *Elias Jacob,* 7 Copp's Land Owner, 83:

> "The act making the grant to the railroad company authorized 'said corporation to take from the public lands adjacent to the line of said road material of earth, stone, timber, and so forth; and only reserved from the otherwise unappropriated land granted, such as was mineral in character.
>
> "I am clearly of the opinion that the act did not except from the grant as mineral such lands as were simply valuable for its deposit of limestone, for such lands under the laws then in force were not subject to disposal as mineral; but, as before stated, were disposed of as agricultural when used for agricultural purposes."

In 1894, in the case of *Tucker v. Florida Ry. & Navigation Co.,* 19 L. D. 414, the question was presented whether the word "mineral," as used in the act of June 22, 1874 (18 Stat. 194), includes phosphate deposits. This act allowed land grant railroads to select public lands "not mineral." The secretary held that phosphate rock was not mineral, saying:

> "It would seem, therefore, that the word mineral is given a limited construction, and

> when this fact is taken into consideration with what has been before stated on the subject of mineral legislation, it would seem that the purpose of the word mineral, as used in the act of June 22, 1874, *supra,* was to except from selection, on account of said act, those lands containing valuable metals, such as gold, silver, cinnabar and copper. The word was not used in its broader sense, for the greater part of the earth contains mineral in some form, the value of which often depends upon its location, or the state or advancement of science which makes known its uses."

The construction of the Southern Pacific grant was again in question in *Union Oil Company,* 23 L. D. 222, where the secretary held that land producing petroleum was not mineral within the meaning of the grant, saying:

> "In my opinion, Congress did not have in contemplation at the time of the passage of the act the reservation of lands containing petroleum under the designation of mineral lands. In my view of the statute, it was only contemplated that lands containing the more precious metals enumerated in section 2320, Revised Statutes, gold, silver, cinnabar, etc., that should be excluded."

The three rulings last referred to are in direct conflict with *Pacific Coast Marble Company v. Northern Pacific Railroad Company,* 25 L. D. 233. Secretary Bliss in that case says:

> "Lands containing valuable mineral deposits, whether of the metalliferous or fossiliferous class, of such quantity and quality as to render them subject to entry under the mining laws, are 'mineral lands' within the meaning of that term as used in the exception from

> the grant to the Northern Pacific Company for railroad purposes, and to the state."

In this decision the secretary clearly begs the question. He defines "mineral lands" as "lands containing valuable mineral deposits," leaving the essential word "mineral" totally undefined. The decision relies on the definition of "mineral" adopted by Secretary Kirkwood in the circular of July 15, 1873, viz:

> "That whatever is recognized as a mineral by the standard authorities on the subject, when the same is found in quantity and quality to render the land sought to be patented more valuable on this account than for purposes of agriculture, should be treated as coming within the purview of the mining act of 1872."

This definition was adopted with reference to the mining law of 1872. As applied to the Northern Pacific and other railroad grants, it must be, we submit, rejected as an unreasonable and impossible definition, (a) contrary to the intention of Congress as disclosed in the laws we have quoted; (b) contrary to the practical construction on the subject; (c) contrary to what the department had uniformly decided theretofore; (d) a definition impossible of application.

That the definition is not a practical one is, we think, demonstrable. It is clear that every odd section within the place limits of this grant must be mineral or non-mineral, and so fall either within the grant or outside of it *upon the date of definite location.* If on that day granite is not mineral,

it passes under the grant and cannot afterward be taken out of it because some years later, by reason of the construction of railroads, or the building up of cities, the stone becomes commercially available. And if the granite ledge involved in this case, which happens to be today commercially profitable, is not within the grant, all the other granites, sandstones, lime-stones, slates and other rocks which are not commercially useful simply because of location, remoteness from market, difficulties of transportation, etc., are equally excluded from the grant, and the company can select agricultural lands in lieu thereof.

The same is true of all clay, brick, petroleum, sand, for all of these substances are, geologically speaking, mineral. If the court below is correct, where is the line to be drawn? Is it to be held that any bed of sand, or of lime, or of clay, which by reason of new scientific discoveries, or the construction of railroads, or the building up of new industries and markets, becomes commercially available and makes the land containing it more valuable for that use than for purposes of agriculture, is thereby taken out of the grant? Such a rule amounts to making mineral today, because somebody files a mining claim, land which nobody would have claimed or taken for its stone in 1884, when the company's rights attached. Such a rule would introduce an intolerable uncertainty into all titles, especially when it is considered that over nineteen million acres of this grant are still un-

patented and lie in a rocky region still largely unsurveyed.

The rule of the court below is moreover an impossible one because it introduces an element of speculation and opinion into the title of every unpatented acre in the Pacific railroad grants. How is it to be determined whether land is more valuable for its stone, for its lime, for its sand, for its clay, than for agriculture? This is quite generally a pure matter of opinion, on which witnesses and experts disagree.

As this brief is being printed there comes to hand a newspaper report of a decision by Secretary Hitchcock just announced concerning land at Butte, that "lands containing ordinary brick clay cannot be acquired under the mining laws." The department's last two rulings illustrate how impossible it is to draw the line between mineral and not mineral under the rule of the court below. Fire brick clay is as much mineral as building brick clay, yet the department is in the predicament of holding the first within the mining law, the second not. Marble is a finer grade of limestone; where would the department draw the line between different grades of limestone? Jasper, a kind of granite, of reddish color, is not mineral according to the department, but the ledge in this case is, probably because it is gray.

Whatever rule is applied, must be decisive of the question as of the day of the grant. Land which is then non-mineral cannot afterward become mineral because of new discoveries in the sciences, of the

building of new railroads, or the creation of new markets, and whatever rule is applied ought to be of simple and certain application. Under the rule decided by the court below there is no place where a line can be drawn, and every unpatented acre of the earth's crust within the limits of these grants may possibly be taken under the mineral laws. We submit that there is no other safe rule than to say that the term "mineral" in these laws means the precious minerals—those minerals which are usually and commonly spoken of as being "mined" —as excluding those things which are only "quarried," like stone, or "dug," like sand or clay.

There is much internal evidence in the Northern Pacific grant that stone was intended to be conveyed, for section 2 specifically provides that the company may take from public lands adjacent to the road (both odd and even sections) stone, timber, etc., for the construction thereof. "Adjacent to the road" in this connection has been interpreted by many decisions to entitle the company to go many miles from the road, provided it takes the nearest material practically accessible. Therefore under this clause the company might range the entire limit of the grant (odd and even sections) to obtain stone for construction; and this is not con-

sistent with the intention to except stone out of the odd sections granted.

The act expressly grants to the company iron and coal lands. As both are generally more valuable than stone lands, it is inconceivable that Congress intended to exclude stone.

If any doubt can remain about the meaning of the term "mineral land," as contained in the Northern Pacific grant, Congress solved that doubt by legislative construction contained in the sundry civil bill approved July 1, 1898 (30 Stat. 597, 620). This act provided a scheme for the relinquishment by the company of lands in contest between the company and settlers and the selection of an equal area elsewhere. It contained the following proviso:

> "*Provided, further*, that the railroad grantee or its successor in interest * * * shall not be bound to relinquish lands sold or contracted by it or lands which it uses or needs for railroad purposes, or lands valuable for *stone*, iron or coal."

If the company did not acquire under its grant lands valuable for stone, why did Congress find it essential to provide that the company need not relinquish such lands under the act of 1898?

We refer to certain other decisions having a bearing on the question:

In 1836, the supreme court of Pennsylvania in the case of *Gibson v. Tyson,* 5 Watts. 34, 41, said:

> "With the bulk of mankind, magnesia is not considered a mineral at all. Nothing is thought by them to be such unless it be of a metallic nature, such as gold, silver, iron, copper, lead, etc."

In *Dunham v. Kirkpatrick,* 101 Pa. St., 36, the legal title to certain land had been conveyed with the reservation "excepting and reserving all the timber suitable for sawing; also all minerals," etc. Subsequently petroleum was discovered on the land and the question arose whether it was embraced in the exception of "all minerals."

The court said:

> "It is true that petroleum is a mineral; no discussion is needed to prove this fact. But salt and other waters, impregnated and combined with mineral substances, are minerals; so are rocks, clays, and sand; anything dug from mines or quarries; in fine, all inorganic substances are classed under the general name of minerals; Bou. L. Dic.; Wor. Dic.; Dana's Geology; Grey's Botany. But if the reservation embraces all these things, it is as extensive as the grant, and therefore void. If, then, anything at all is retained for the vendor, we must,

by some means, limit the meaning of the word 'minerals'."

In *Alford v. Barnum*, 45 Cal., 482, the court, defining mineral lands, says:

> "It must at least be shown that the land contains *metals* in quantities sufficient to render it available and valuable for mining purposes."

In *Morrill v. Dixon*, 15 Nev. 407, the court, referring to the exception of mineral lands from the Southern Pacific grant, quotes this language with approval.

In *Smelting Company v. Kemp*, 104 U. S. 649, the court said:

> "A mining claim is a parcel of land containing *precious metal* in its soil or rock."

In *Overman Sol. M. Co. v. Corcoran*, 15 Nev. 417, the court said:

> "If the findings of the court as to the non-existence of any vein or ledge of *gold, silver, or other metalliferous bearing ores, earth or rock*, is sustained by the evidence, then the second and third points relied upon by appellants need not be considered, *for under the laws of Congress no valid location of a mining claim can be made until a vein or deposit of gold, silver or metalliferous ore or rock in place has been discovered.*"

In *McKeon v. Bisbee*, 9 Cal. 137, the court said:

> "A mining claim is a piece of land supposed to contain in its soil or rock gold or other precious metal."

In *Listowell v. Gibbings*, 9 Irish C. L. Reports, 223, 232, the court says:

> "Minerals mean ordinarily metallic fissile bodies."

Justice Miller, in *Stevens v. Williams*, 1 *McCrary*, 480, says:

> "I gave that instruction, but with the distinct understanding that all this substance between porphyry and limestone that has been explained to you, which contains mineral—I mean which contains *ore*—is rock in place."

In *Stevens v. Gill*, 1 Morrison's Mining Reports, 579, Judge Hallett says:

> "A lead cannot exist without valuable ore."

In *Eureka etc. Co. v. Richmond Mining Co.*, 4 Saw. 302, Mr. Justice Field defines a lode as "metal-bearing rock."

Judge Hillyer, rendering the opinion of the court in *Mount Diablo Mining Co. v. Collison*, 5 Saw. 439, uses the term "metal zone" as equivalent to "mineral zone."

See also *Reynolds v. Iron Silver Mining Co.*, 116 U. S. 695; *Richmond Mining Co. v. Eureka Mining Co.*, 103 U. S. 839; *Jupiter Mining Co. v. Bodie Co.*, 7 Saw. 96.

The particular attention of the court is requested to the case of *Barden v. Northern Pacific Railroad Company*, 154 U. S. 288, 314, in which the court discusses the policy of Congress in regard to excepting mineral from grants for the benefit of railroads and holds that until the issuance of patent

lands within the primary limits of the Northern Pacific grant are subject to exploration for minerals. In this case the court recognizes the distinction which we have pointed out between mines and quarries and between deposits of precious metals and deposits of substances which fall within the strict scientific definition of "mineral." The court said:

> "The granting of lands, either by the government or individuals, with a reservation of certain quarries therein, as of marble, granite, or slate, or of certain mines, as of copper, or lead, or iron found therein, is not an uncommon proceeding, and the knowledge or want of knowledge at the time by the grantee in such cases, of the property reserved in no respect affects the transfer to him of the title to it. No one will affirm that want of such knowledge on the identification of the lands granted, containing the reserved quarries or mines, would vacate the reservation, and we are unable to perceive any more reason from that cause for eliminating the reservation of minerals in the present case from the grant of the government than for eliminating for a like cause the reservation of quarries or mines in the cases supposed."

In the concluding paragraph of its opinion the learned Circuit Court of Appeals says, that if indeed, the reservation of mineral in this grant was understood at the time of its passage not to include granite quarries, Congress nevertheless retained the power subsequently to enlarge the reservation before rights were vested by definite location of the road.

It is true that the act contained a qualified right to alter, amend, or repeal. See section 12, which reads as follows:

> "And be it further enacted, that the better to accomplish the objects of this act, namely, to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the government at all times (but particularly in time of war) the use and benefits of the same for postal, military and other purposes, Congress may, at any time, having due regard for the rights of said Northern Pacific Railroad Company, add to, alter, amend, or repeal this act."

This right was one reserved only "to accomplish the object of this act, namely, to promote the public interest and welfare by the construction of said railroad," etc. In the next place, the amendment, alteration or repeal was to be one "having due regard to the rights of the Northern Pacific Railroad Company."

We deem it unnecessary to discuss the extent of the *power* of Congress to alter, amend, or repeal the act, because there is no evidence in any legisla-

tion that Congress intended to exercise such power. The first act of Congress which referred to stone was that of July 3, 1878, which provided that stone might be sold on the same terms as timber land. The first act of Congress which treated stone as a mineral capable of being located under the mining laws, usages and customs, was the act of August 4, 1892. This act was passed eight years after the company's rights had attached to the land in question by definite location. By no sort of strained construction can this act or the prior ones be treated as an amendment to the grant. It is too clear for discussion that it never occurred to Congress that it was amending the railroad grants when it passed these laws. The claim of Mr. Soderberg was as we have shown, not instituted until 1896, twelve years after the title of the company became consummate. Unless by the terms of the original grant Congress used the term "mineral" as including granite rock, the decree must be reversed.

C. W. BUNN,
JAMES B. KERR,
Counsel for Appellant.

The following cases, decided at the last term, support the jurisdiction of this court in this case; *Sweringen v. St. Louis*, 185 U. S. 38, 45-46; *Huguley Mfg. Co. v. Galeton Cotton Mills*, 184 U. S. 290; *Patton v. Brady, Exr.*, 184 U. S. 608; *Howard v. United States*, 184 U. S. 676, 680.

Supreme Court of the United States.

OCTOBER TERM, 1901.

NORTHERN PACIFIC RAILWAY COMPANY,

Appellant,

vs.

J. A. SODERBERG,

ARGUMENT IN OPPOSITION TO MOTION TO DISMISS APPEAL.

The appellee has moved to dismiss this appeal on the ground that the decision of the circuit court of appeals is final.

Section 6 of the act of 1891 (26 Stat. 826) provides as follows:

> "That the circuit courts of appeals established by this act shall exercise appellate jurisdiction to review by appeal or by writ of error

> final decision in the district court and the existing circuit courts in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law, and the judgments or decrees of circuit courts of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy, being aliens and citizens of the United States or citizens of different States; also in all cases arising under the patent laws, under the revenue laws, and under the criminal laws and in admiralty cases. * * * * * * * *
>
> "In all cases not hereinbefore, in this section, made final there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars besides costs."

It is clear that in cases where the jurisdiction of the circuit court depends *entirely* upon diversity of citizenship the decision of the court of appeals is final. In cases where it is apparent from the bill or declaration that the plaintiff's right arises directly out of an act of congress and depends on the interpretation of such act, the decision of the circuit court of appeals is not final, but an appeal or writ of error lies to this court. The fact that the jurisdiction of the circuit court might have been sustained upon diversity of citizenship will not render the decision of the court of appeals final, if the bill or declaration presented a federal question giving the circuit court jurisdiction without regard to the citizenship of the parties. The single question presented therefore by the motion to dismiss is, whether the circuit court would have had juris-

diction if the allegations of diverse citizenship had been omitted.

The bill alleges title in the complainant under the grant to the Northern Pacific Railroad Company by act of congress of July 2, 1864. It is shown that by that act alternate odd-numbered sections of non-mineral public land on each side of the railroad within specified limits were granted, excepting however, those lands which were subject to claims, or which had been reserved, at the date of definite location; that the premises in controversy are part of an odd section within the granted limits and were free from claims and not reserved at the date of definite location. It is alleged that the premises are rough mountainous land and their principal value consists in the existence thereon of a ledge of granite of good and merchantable quality and of considerable value; that under the true construction of the congressional grant such lands are non-mineral and included within the conveyance made by the act. The bill charges, that by virtue of certain mineral locations of the premises under the acts of congress for the granite theron the defendant claims title and claims that because of the granite the lands were mineral and so excepted from the grant made by congress in the railroad act. The bill prays an injunction restraining the defendant from quarrying and removing the granite.

It appears that the complainant has no patent to the premises and its whole title to the land and its right to the relief sought depend upon the interpre-

tation and effect to be given to the grant. The question presented by the bill is whether land chiefly valuable for granite is "mineral" within the true meaning of the grant.

Nothing can be clearer than this; if the plaintiff's title arises directly from an act of congress, and if the question involved depends on the construction of the act, the case is one arising under the laws of the United States.

In *Cooke v. Avery*, 147 U. S. 375, this court sustained the jurisdiction of the circuit court on the ground that the case arose under the laws of the United States. The action was in trespass and was brought in the circuit court for the northern district of Texas. The plaintiff in his petition set forth that he and the defendants derived title from one P. as a common source; that the defendants deraigned title from a deed by P. and wife while plaintiff claimed title under an execution sale upon a judgment recovered against P. in the circuit court of the United States for the northern district of Texas before the execution of the deed from P. to the defendants. The petition further alleged that by reason of certain laws of the United States and rules of the circuit court, which were specifically referred to, the judgment was a lien on the property in question from its rendition and continued to be a lien up to the date of the execution sale, by reason whereof plaintiff had a superior title to the property, but that defendants denied that the judgment was ever a valid lien under said laws and rules.

The court said (p. 384):

> "Whether a suit is one that arises under the Constitution or laws of the United States is determined by the questions involved. If from them it appears that some title, right, privilege or immunity on which the recovery depends will be defeated by one construction of the Constitution or a law of the United States or sustained by the opposite construction, then the case is one arising under the Constitution or laws of the United States."

The court continued (p. 390):

> "It is unnecessary to pursue this branch of the case further. Plaintiff is to be regarded as the purchaser at the sale, and the validity of his purchase turned upon the existence of a lien, which he asserted and the defendants denied. The disposition of this issue depended upon the laws of the United States and the rules of the Circuit Court and their construction and application were directly involved. We are of opinion that jurisdiction as resting on the subject matter was properly invoked."

Spokane Falls, etc. Ry. Co. v. Ziegler, 167 U. S. 65, was a case which came to this court on writ of error to the circuit court of appeals. The action was commenced by Ziegler, a citizen of Washington, in the superior court for Spokane county, Washington, against a Washington corporation and was removed on petition of the defendant to the United States circuit court. A judgment for Ziegler was affirmed by the circuit court of appeals.

In this court the railway company sought to have the judgment reversed with directions to remand the case to the state court, upon the ground

that the circuit court was without jurisdiction. This court said (p. 72):

> "In his complaint the plaintiff alleged that, on May 1, 1889, he was in possession, as a pre-emptor under the laws of the United States, of a tract of land containing about eighty acres, and on said date had made all the improvements and had lived on the land a sufficient length of time, and had done all other acts necessary to entitle him to a patent to the same from the United States; that the defendant company, being a corporation of the Territory of Washington, on said date entered upon and seized a strip of said land fifty feet in width, and appropriated it for railroad purposes without the consent of the plaintiff, and without having compensated him therefor; and that the entry upon and seizure by the defendant of the land was under and pursuant to the laws of the Territory of Washington authorizing railroad companies to appropriate land for right of way for railroad tracks.
>
> We have judicial knowledge that the authority of the Territory to legislate, in respect to the right of a territorial railroad corporation to enter upon the public lands of the United States, was derived from the act of Congress entitled 'An act granting to railroads the right of way through the public lands of the United States,' approved March 3, 1875, 18 Stat. 482, whereby the right of way through the public lands of the United States was granted to any railroad company duly organized under the laws of any State or Territory.
>
> The plaintiff's complaint, therefore, discloses the case of a contest between a settler claiming title under the laws of the United States and a railroad company claiming a right under an act of Congress; and of such a case the Circuit Court for the District of Washington clearly had jurisdiction. *Doolan*

v. Carr, 125 U. S. 618, 620; *Cooke v. Avery*, 147 U. S. 375."

See also *Doolan v. Carr*, 125 U. S. 618.

It is urged by the appellee that, although a federal question may be presented by the allegations of the bill, under which the complainant shows that its right to the relief sought depends upon the construction of the laws of the United States, nevertheless the force of these averments is destroyed by the allegation that the character of the land as mineral or non-mineral has not been determined by the interior department.

But this is not one of those cases where it is necessary for the courts to await the finding of the interior department on a disputed question of fact; for in this case the facts are not disputed; the character of the land as alleged in the bill is admitted in the answer and was stipulated on the trial; the whole question is one of law, viz., whether land containing merchantable veins of granite is mineral under the Northern Pacific grant.

In *Northern Pacific Railway Company v. Myers*, 172 U. S. 589, this court held that lands within the place limits of the Northern Pacific grant, which are in fact non-mineral, are subject to taxation by specific description before the mineral or non-mineral character has been determined by the interior department. This decision was reached upon the ground that the full beneficial interest passed to the company upon the fixing of the granted limits by definite location. That the legal title

and the full beneficial interest in lands in fact non-mineral passed upon definite location and before the issuance of patent and before the determination of the fact by the interior department was decided in the Myers case upon the authority of *Deseret Salt Company v. Tarpuy,* 142 U. S. 241, 316, where the right to maintain ejectment was sustained.

But a conclusive answer to this suggestion is that it is not a point which goes to the *appellate jurisdiction of this court*: it relates only to the jurisdiction of the *circuit court.*

It is submitted that the motion to dismiss the appeal should be denied.

C. W. BUNN,
JAMES B. KERR,
Counsel for Appellant.

Supreme Court of the United States.

OCTOBER TERM, 1901.

NORTHERN PACIFIC RAILWAY COMPANY,
Appellant,

vs.

J. A. SODERBERG,

ADDITIONAL BRIEF FOR APPELLANT.

In the brief filed by appellee on the merits is some argument on questions of jurisdiction.

I.

It is urged first that the allowance of his entry by the land department is conclusive that the land covered thereby is *mineral land*, and it is pointed out that after the cause was heard in the Circuit

Court a patent was issued upon this entry, which was ordered to be filed and made a part of the record in the cause.

There are several answers to the suggestion.

In the first place it appears by the agreed statement in what manner appellee made his entry—that he filed his application in the district land office, "*and by such application he requested to be permitted to purchase said claims as mineral land, and he then and there undertook and offered to maintain by proof that the said claims were valuable only for the granite and building stone therein and thereon, and were mineral lands of the United States, and subject to location under the laws, rules and regulations pertaining to placer mineral claims*" (Transcript, page 31). It affirmatively appears, therefore, that the land department holds the lands in controversy to be *mineral* lands *because* they are chiefly valuable for granite. The effect of the allowance of the entry and of the issuance of patent must be controlled by the facts appearing of record in the land department, and the foregoing extract from the agreed statement is a recital of such record facts. That the lands are mineral is simply the department's legal conclusion from the facts.

In *Burfenning v. Chicago, etc. Ry. Co.*, 163 U. S., 321, an action was brought by Burfenning upon a patent issued on a homestead entry to recover from the defendant the possession of an island in the Mississippi river which was within the corporate

limits of the city of Minneapolis. It was urged by the defendant that the patent was absolutely void and did not pass the legal title for the reason that public land within the limits of an incorporated city was not subject to homestead entry. It appeared that the city of Minneapolis was incorporated March 8, 1881, and this court examined the record of the land department which was in evidence in the case and ascertained that the right of the patentee was initiated March 17, 1883. The contention of the defendant was sustained. The Court said:

> "This is not a case in which the patent was founded upon actual occupancy for homestead purposes, or in which nothing appearing but the patent itself there might be uncertainty as to the time at which the patentee's rights were initiated—whether before or after the incorporation of the city. It is one where, affirmatively and by the record, it is disclosed that there was no pretence or semblance of claim on the part of the patentee until two years subsequent to the organization of the city, and in that respect differs from *Texas & Pacific Railway v. Smith*, 159 U. S., 66, in which, on account of the absence of all testimony, there was suggested an uncertainty as to the time at which, by way of relation, the patentee's rights took effect. The case, therefore, comes within the general rule announced as to the invalidity of a patent issued in defiance of the expressed will of Congress."

In the second place the suggestion of appellee is without force for the reason that the entry was allowed upon land which had already been disposed of by congress. If we are right upon the main ques-

tion the title passed out of the United States upon definite location of the railroad March 26, 1884, and the land department was without jurisdiction to allow appellee's entry or issue his patent.

In the Burfenning case, *supra*, the Court said further:

> "The case of *Morton v. Nebraska*, 21 Wall., 660, is very closely in point. In that case the plaintiff held a patent for lands in Nebraska which were saline lands, and noted as such on the field books, although the notes thereof had not been transferred to the register's general plats. The preemption act of September 4, 1841, c. 16, 5 Stat. 453, 456, declares that 'no lands on which are situated any known salines or mines shall be liable to entry.' Notwithstanding this prohibition patents were issued for the lands, and it was held that they were absolutely void, the court saying, p. 674: 'It does not strengthen the case of the plaintiffs that they obtained certificates of entry, and that patents were subsequently issued on these certificates. It has been repeatedly decided by this court that patents for lands which have been previously granted, reserved from sale, or appropriated, are void. The executive officers had no authority to issue a patent for the lands in controversy, because they were not subject to entry, having been previously reserved, and this want of power may be proved by a defendant in an action at law."

Again, it appears that the entry of appellee was made while the land was yet unsurveyed and his receipt was issued by the district land office December 20, 1898 (Transcript, p. 32). The plat of survey of the township was not filed until April 11, 1899 (Transcript p. 32). It follows, therefore,

that, when the land department acted upon appellee's application and allowed his entry, the only question before it was whether the land was valuable for granite and building stone as alleged in the application.

The land not having been surveyed, it was not then identified as an odd section, and the department had no jurisdiction to pass on the question of whether the land was mineral or non-mineral within the exception of the Northern Pacific grant

II.

The second point urged by appellee is that complainant has mistaken its remedy and that it should have filed its bill to hold the patentee trustee of the legal title. Suits to hold a patentee trustee can be maintained only where the patent passes the legal title and is voidable merely and not void. *Johnson v. Towsley*, 13 Wall., 72. The complainant contends that the land in controversy is non-mineral, although valuable for building stone, and if this is so, the title both legal and equitable passed out of the United States by the grant *in praesenti*, the land being in the place or granted limits. The patent is therefore absolutely void. The title to land which the United States has previously sold or granted cannot be affected by a patent issued by the land department, as the officers are without jurisdiction. *Van Wyck v. Knevals*, 106 U. S., 360; *Morton v. Nebraska*, 21 Wall.,

660; *Burfenning v. Chicago etc. Ry. Co.*, 163 U. S. 321.

III.

The third point made is equally without force. Appellee urges that because the railway company failed to respond to his notice published under sections 2325 and 2326 of the Revised Statutes, and commence an action for the determination of adverse claims in some court of competent jurisdiction, the complainant is concluded as to the character of the land.

But the land had not been surveyed when this notice was published, and the railroad company could not then determine that the land described therein would fall within an odd section and so be defined as part of its grant.

And the statute does not contemplate that the *character* of the land is a matter to be litigated in the adverse claim suits there provided for. This proceeding is solely for the purpose of trying in the courts the question of the respective claims of adverse claimants under the mining laws. *Alice Placer Mine*, 4 Land Decisions, 314; see also *Iron Silver Mining Co. v. Campbell*, 135 U. S., 286; *Turner v. Sawyer*, 150 U. S., 578; *Perego v. Dodge*, 163 U. S., 160-8.

C. W. BUNN,
JAMES B. KERR,
Counsel for Appellant.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1901.

NORTHERN PACIFIC RAILWAY COMPANY, *Appellant,*	No. 598
vs.	
J. A. SODERBERG, *Appellee.*	

MOTION TO DISMISS APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

Comes now J. A. Soderberg, appellee herein, by J. T. Ronald, his solicitor, and moves this Honorable Court that this appeal be dismissed, and bases this

motion upon and alleges the following grounds, to-wit:

I.

This cause was instituted by the appellant as complainant, against the appellee as defendant, originally in, and tried by, the Circuit Court of the United States for the District of Washington, Northern Division.

II.

That the jurisdiction of said Circuit Court for said District of Washington, Northern Division, was invoked, as appears from the subpoena and bill of complaint, upon the ground of divers citizenship; and it does not appear affirmatively from said subpoena or said bill of complaint that any other ground of jurisdiction was invoked; that divers citizenship was the sole ground upon which jurisdiction was rested.

III.

That on the 8th day of March, A. D. 1900, a decree was therein entered in favor of the appellee therein, confirming his title to the premises in dispute, and dismissing the bill of complaint of the said complainant, from which decree so rendered, complainant, as appellant, appealed to the United States Circuit Court of Appeals for the Ninth Circuit, which said United States Circuit Court of Appeals there-

after, on October 1st, 1900, duly entered its judgment and decree, confirming the decree of the said Circuit Court of the United States for the District of Washington, Northern Division.

Wherefore, by reason of the facts aforesaid, said decree of said United States Circuit Court of Appeals for the Ninth Circuit was a final judgment, and no appeal lies therefrom, and the attempted appeal herein does not give this court jurisdiction.

J. T. RONALD,
Solicitor for Appellee.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1901.

NORTHERN PACIFIC RAILWAY COMPANY, *Appellant,*

vs.

J. A. SODERBERG, *Appellee.*

No. 598.

ARGUMENT OF APPELLEE ON MOTION TO DISMISS APPEAL.

Appellee moves to dismiss, for the reason that the only ground on which the jurisdiction of the Circuit Court of the United States for the District of Washington, Northern Division, was invoked, being divers citizenship, the judgment of the United States Circuit Court of Appeals for the Ninth Circuit, from which this appeal is attempted, was final.

If this reason is well founded in fact, this appeal must be dimissed under previous decisions of this court. Let us examine the subpoena and bill of complaint.

The *Subpoena Ad Respondendum* (see record p. 4) in so far as it is material here, commands Soderberg to "be and appear in said Circuit Court of the United States aforesaid, at the court room in Seattle, on the 5th day of December, A. D. 1898, and answer the bill of complaint for judgment against you in said court by the Northern Pacific Railway Company, who is a citizen of the State of Wisconsin, and to do and receive what said court shall have considered in that behalf, and this you are not to omit under the penalty of Five Thousand Dollars.

"Witness, etc., etc."

The amended bill of complaint (see record p. 5) commences as follows:

"The Northern Pacific Railway Company, a corporation, organized, created, and existing under and by virtue of the laws of the State of Wisconsin, by leave of court first had and obtained, files this, its amended bill of complaint, against J. A. Soderberg, a citizen and resident of the State of Washington, and thereupon your orator complains and says:"

Paragraph one alleges the incorporation of the Northern Pacific Rail*road* Company by an act of Congress approved July 2, 1864, with certain powers and authorities therein.

Paragraph two quotes certain sections of that Act granting lands to the Railroad Company.

Paragraph three alleges the acceptance by the Railroad Company of the terms and conditions imposed by Congress.

Paragraph four sets out the joint resolution of May 31, 1870, by which an alteration was made in the Act, and authorizing the company to build its main road via the valley of the Columbia river, with its branch from some convenient point on its main trunk line across the Cascade mountains to Puget Sound.

Paragraph five alleges that thereafter the Northern Pacific Railroad Company proceeded with the work of surveying and locating the line of its branch road from Pasco to Tacoma, Washington, and prior to March 26, 1884, had surveyed and definitely located said Cascade branch, extending coterminous with and within forty miles of the northeast quarter of section nineteen (19), township twenty-seven (27) north, range ten (10) east, of the Willamette meridian, and on said 26th day of March, 1884, filed its plat of definite location in the General Land Office. That at said date said land above described was public land, to which the United States had full title, and had not reserved, sold or otherwise appropriated, and was non-mineral in character.

Complainant further alleges in paragraph five, that it complied with all the conditions, so that on April 23, 1884, the president accepted the railroad coterminous with said land and directed that patents be issued, conveying same to the Northern Pacific Railroad Company, but that no patent has yet issued, and that by virtue of the matters and things therein

alleged, said Northern Pacific Railroad Company became, and until the 31st day of August, 1896, was the owner of said land, and was entitled to the exclusive possession of the same.

Paragraph six alleges "that your orator, Northern Pacific Railway (by mistake printed Railroad) Company, is a corporation organized, created and existing under and by virtue of the laws of the State of Wisconsin, and is a citizen of the State of Wisconsin, and was not organized, nor is it a corporation under the laws of the State of Washington."

Paragraph seven alleges that on or about the 31st day of August, 1896, the Rail*way* Company, by virtue of certain deeds of conveyance executed by the Rail*road* Company, became the owner of all the rights of said Railroad Company.

Paragraph eight alleges that the Railway Company, ever since that date has been and is operating said railroad, carrying mails, etc.

Paragraph nine alleges that the matter in dispute is of the value of $5,000, and that the defendant, on the .... day of ....., 1898, entered upon the land, and without any right, authority or permission, and against the will of the complainant, commenced to excavate, blast, quarry and remove the granite from the land and to sell and dispose of the same, and has continued daily since that date to do the same, and

threatens to continue so to do; that he has already quarried and shipped over 8,000 lineal feet of granite of the value of $1.10 per foot, and that he is insolvent and financially irresponsible and unable to respond for the injury done, and his acts work irreparable injury to the complainant, who asks for an injunction.

Omitting for the present paragraph ten, we note that the complainant in paragraph eleven alleges: "That the defendant was, at the time of the filing of the original bill, and for a long time prior thereto had been, and ever since said date has been, a resident and citizen of the State of Washington."

Briefly summarized, the ten paragraphs above referred to, merely allege that the Northern Pacific Rail*road* Company was granted certain lands; that the Northern Pacific Rail*way* Company is the successor of the Northern Pacific Railroad Company; that the defendant wrongfully entered upon the lands without right or authority, and has been and still is quarrying and removing granite therefrom; that the complainant (paragraph 6) is a citizen of the State of Wisconsin, and the defendant (paragraph 11) is a citizen of the State of Washington, and the matter in dispute (paragraph 9) is of the value of Five Thousand Dollars.

Now, we submit that there is not a single allegation in the complaint thus far analyzed, upon which it

is possible to rest the jurisdiction of the Circuit Court, excepting divers citizenship solely. If there is any other ground mentioned in this complaint upon which jurisdiction can be rested, it must be in the allegations of paragraph ten, which let us now examine:

These allegations show "that defendant as complainant is informed and believes, has filed what purports to be a mineral location upon the premises, and claims them as such for the granite thereon, which granite may be used for building purposes, by reason of which defendant asserts that said premises are excepted from the grant to the Railroad Company under act of June 2, 1864."

But we think that if it was intended by the above allegation to raise any federal question, the complainant has either pleaded too much or too little. The single allegation above set forth is insufficient, in our judgment, to give the court jurisdiction. Again, if that allegation standing alone is sufficient, then we submit that the complainant has pleaded too much, for to said last allegation complainant adds the words (being the last words in paragraph ten) "And the question of whether said premises are mineral or non-mineral has not yet been determined by the Land Department of the United States."

This court has repeatedly held that courts will not determine, in advance of the Land Department, the character of the land; so that we think it shows

on the face of paragraph ten, that the question attempted to be raised is one which this court will not pass upon until after the Land Department shall have first decided the matter.

Now, to further illustrate the point, suppose we eliminate from the bill of complaint all allegations of divers citizenship, or, suppose both parties to be citizens of the State of Washington, and the only ground for the invocation of the jurisdiction of the Circuit Court to be the allegations in said paragraph ten. Does enough appear therefrom to confer jurisdiction upon the Circuit Court? If not, then jurisdiction is not rested upon the allegations of paragraph ten, but must therefore rest solely upon divers citizenship.

"When the original jurisdiction of the Circuit Court of the United States is invoked upon the sole ground that the determination of the suit depends upon some question of a federal nature, it must appear at the outset from the declaration of the bill of the party suing, that the suit is of that character; in other words, it must appear, in that class of cases, that the suit was one of which the Circuit Court, at the time its jurisdiction is invoked, could properly take cognizance."

Col. Cent. Con. Min. Co. v. Turck, 150 U. S. 143.

Now, we think, that if there were no question of divers citizenship here, and jurisdiction of the Circuit Court was invoked upon the sole allegations in paragraph ten, the court would refuse to entertain the

case, especially, if for no other reason, in advance of the Land Department.

"In order to maintain that the decision of the Circuit Court of Appeals was not final, it must appear that the jurisdiction of the Circuit Court was not dependent entirely upon the opposite parties being citizens of different states."

Borgemeyer vs. Idler, 159 U. S. 412.

Under the doctrine announced in the case last cited, it appears from the subpoena and bill of complaint herein "that the suit was one of which cognizance could be properly taken on the ground of divers citizenship, and it did not appear therefrom that jurisdiction rested or could be asserted on any other ground."

See, also, *Press Publishing Co. vs. Monroe,* 164 U. S. 105.

Wherefore, appellee respectfully submits that the appeal herein should be dismissed.

J. T. RONALD,
Solicitor for Appellee.

No. 272, 61

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Clerk.

Brief of Ronald for Appellee

IN THE

SUPREME COURT OF THE UNITED STATES

Filed October Term, 1901.

NORTHERN PACIFIC RAILWAY COMPANY,
Appellant,
vs.
J. A. SODERBEEG,
Appellee.
No. 272

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF OF APPELLEE ON MOTION TO DISMISS AND ON THE MERITS.

J. T. RONALD,
Solicitor for Appellee.

The Metropolitan Press, Seattle.

IN THE

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BRIEF OF APPELLEE ON MOTION TO DISMISS AND ON THE MERITS.

The motion of the appellee to dismiss this appeal having been postponed until the case is reached for hearing on the merits, appellee in addition to the matters urged in his printed argument heretofore pre-

sented in support of said motion, urges the following additional grounds for dismissing said appeal:

It is conceded by learned counsel in their answer to our argument on motion to dismiss that their sole reliance for the asking of this court to assume jurisdiction arose out of their allegations in paragraph 10 of their bill of complaint. This paragraph, briefly analyzed, alleges: "That defendant has filed a mineral location upon the premises and claims them as such for the granite thereon, and the question of whether said premises are mineral or non-mineral has not yet been determined by the land department of the United States."

In our argument on motion to dismiss we have discussed this paragraph to some extent, to which we now refer, and in addition thereto urge the following grounds for dismissal:

I.

This court will not assume jurisdiction because the question of fact as to this being mineral land has been decided by the land department and patent issued.

II.

Complainant and appellant has mistaken its remedy.

III.

The appellant, as is shown by the records, has waived any right which it may have had to make any claim to the lands in controversy.

The stipulation shows that Soderberg, being qualified to enter mineral land, and the land in controversy being unsurveyed, said Soderberg, in accordance with the *mining* laws, entered and located the "Lillie" and "Linea" mining claims. That he did the required amount of work and labor and improvements thereon to entitle him to a patent, if the same are mineral lands. That he complied with all the rules and regulations of the land department, and made the proof necessary, and it was assumed by the land department that he was entitled to a patent. That he paid for the claims, and that "patent, if not already issued, will issue in due course of time and as soon as the officers of the land department can in the regular course of business issue the same" (see transcript, pp. 30 to 32). Subsequent to the filing of the stipulation and prior to the decision in the case by the lower court, patent was issued for these lands as mineral lands, and by stipulation of the parties, such patent was filed as an exhibit in the case (See transcript, pp. 37 to 40). If this land had been applied for by Soderberg under the act of 1878 known as the Timber and Stone Act, complainant might have had better standing in court than it now has, for this

Timber and Stone Act, which was passed prior to the date of definite location of the railroad, provides for the entry of lands valuable for *stone*, and *unfit for cultivation*. Application to purchase under this act may not have been in fact a mineral application, although the stone may be mineral. But the application in this case, it is conceded, was a mineral application, and the dispute as to whether the land was mineral or not has been submitted to the Land Department and by that department decided to be mineral land. This court has decided in numerous instances that this question of fact decided by the Land Department is conclusive upon this court. If by reason of a misconstruction by the Land Department of an act, land to which the complainant or appellant is entitled has been patented to the appellee, then the remedy would be an action to declare the appellee a trustee and to require a conveyance of the land to the appellant.

And this brings us to our second additional ground for dismissing this action, namely, that appellant has mistaken its remedy.

II.

The only relief sought by the bill of complaint in this action is to enjoin the defendant from removing any of the granite, and to require him to account to the complainant for any and all granite theretofore sold. It is not an action to decree the defendant a trustee of the land for the railroad company, and we

submit that the only way in which the complainant can now recover the land in question is by showing that the Land Department, by a mistake and misconstruction of the law, patented to Soderberg lands to which complainant was entitled. Counsel may contend that the burden of their argument in this case is to show such misconstruction of the Land Department, but we submit that where the record shows, as it does in this case, that the claim of the defendant is based upon a mineral application and that the character of this land as mineral has been determined by the Land Department, that this question as to whether or not as a fact it is or is not mineral, is conclusive upon this court; that the question of misconstruction or mistake of the Land Department is not an issue in this particular action; that this is a collateral attack upon the patent, or, to state the question with greater particularity: Here is an action to restrain defendant from removing and selling any granite from lands claimed by the railroad company, and to require the defendant to account to the railroad company for granite theretofore removed and sold. That is the theory of the complainant's suit. The defendant shows that he is acting under a mineral patent; the complainant collaterally attacks this patent by alleging its issuance to have been the result of misconstruction or mistake of the Land Department. We submit that if the patent is to be thus attacked it must be attacked directly and in an action for that purpose upon the

theory and based upon the ground that the patent is void by reason of such mistake or misconstruction of the Land Department.

III.

Now, our third proposition that the railroad company have waived any right to assert any claim it may have had, is based upon the fact that the railroad company failed to adverse Soderberg's application for a patent. We think it has no standing in court now. The stipulation shows that the application was duly made and notice duly given; that the complainant made no appearance, objection, contest nor filed any adverse claim. The railroad company cannot now be allowed to contest this matter unless it be by an action directly to set aside the patent for mistake or misconstruction. Failure to file an adverse claim is fatal in this form of an action.

See Barringer & Adams on the Law of Mines and Mining in the United States, pp. 382 to 388, 394, 415, 416;

N. P. R. R. Co. v. Cannon, 54 Fed. 257;
Seymour v. Fisher, 16 Colo. 188;
Dahl v. Raunheim, 132 U. S. 260.

Wherefore, appellee respectfully submits that the appeal herein should be dismissed.

J. T. RONALD,
Solicitor for Appellee.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1901.

NORTHERN PACIFIC RAILWAY COMPANY,

Appellant,

vs.

J. A. SODERBERG,

Appellee.

No. 273

BRIEF ON THE MERITS.

STATEMENT.

The facts in this case are set forth in the stipulation (transcript, pp. 24 to 33).

ARGUMENT.

The learned counsel for appellant are not quite accurate in the statement of the question involved in this case to be "whether land containing a granite quarry is mineral within the true meaning of the

Northern Pacific grant, so as not to pass thereby." The proposition involved is more accurately stated by the Circuit Court of Appeals from which this appeal is pending, to be "whether land which is chiefly valuable for granite of a good merchantable quality is mineral land within the meaning of the exception from the grant of lands to the Northern Pacific Railroad Company" (transcript, p. 53). Appellee claims only a very small fraction of a quarter section. We do not claim that the mere existence of some granite on a quarter section, *per se*, will make the whole quarter mineral land, but is the particular small area in question in controversy in this case more valuable for its granite than for any other purpose? It is stipulated (transcript, p. 30) that the principal value of these claims consists in a ledge of granite running through them of a good and merchantable quality, valuable for building stone, capable of being quarried and of the value of more than five thousand dollars. (We note here parenthetically that the use of the word "ledge" is hardly applicable to a granite formation, it being more in the nature of regular or irregular stratified rock, but this does not affect the merits of this case).

Section 3 of the act of July 2nd, 1864, grants to the railroad odd numbered sections, *not mineral*, on the line of the road, to which the United States have full title, *not reserved, or otherwise appropriated, and free*

from other claims or rights, at the time the line of said road is definitely fixed, and the plat thereof filed in the general land office. It provides further, that if prior to said definite location, any part of said land shall have been *reserved or otherwise disposed of,* the company may select other lands in lieu thereof.

There is a proviso in such section that "all mineral lands" are excluded from the grant, and in lieu thereof a like quantity of agricultural lands may be selected by the company. The word "minerals" shall not be held to include iron or coal. Congress reserved the right at any time to add to, alter, amend or repeal the act.

This act excludes two classes of land, which are within the limits of the grant—First, mineral land; and second, land which Congress, in the meantime, and prior to definite location, shall have reserved, or otherwise appropriated, or which, at date of definite location, might not be free from other claims or rights.

It will be observed, therefore, that Congress reserved the right for any purpose and at any time prior to the definite fixing of the line of the road to reserve, or otherwise appropriate, or make enterable or subject to claims or rights under other laws, such lands within the limits of the grant as it might see fit, whether mineral or not mineral, and for such lands as

might thus be reserved, or otherwise appropriated or be subject to other claims or rights at the date of definite location of the road the company should have the right to select lieu lands. These lieu lands were to be *agricultural* lands. We emphasize the word "*agricultural*" for the reason that it appears to evidence the intention of Congress that only agricultural lands are to be granted to the railroad companies. Hence, we maintain the railroad has no right to this land by reason of two propositions:

I.

It is included within the exception of mineral lands.

II.

If, however, it should be held not to be "mineral land" within the meaning placed by Congress on this term in the granting act, still subsequently to the granting act, and prior to the definite fixing of the line of road, this character of land was *reserved* or *otherwise appropriated* by Congress, and therefore at the date of the definite fixing of the line of road, it was not free from, but subject to, other claims or rights, and did not pass when the grant took effect.

Counsel admit that the word "mineral" alone has a broad and well defined meaning, but contend that when used as a word qualifying "land" it has a very contracted meaning.

While admitting what are mineral substances, they deny that land containing most of these mineral substances is "mineral land." The land may have no value except for these numerous substances admitted to be mineral, yet, according to counsel some tracts may abound in gypsum, alum, nitrate of soda, phosphate, petroleum; others may be completely covered with strata of sandstone, limestone, granite, marble, or with mines of opals or diamonds, all conceded to be minerals, yet such land is not "mineral land." That these words in the reservation clause of this grant are used to designate only lands abounding in gold, silver, copper, cinnabar or lead. In short, counsel advance the anomalous doctrine that, not all lands valuable chiefly for well recognized, useful and commercial mineral substances are mineral lands; that while Congress reserved "mineral lands" from the grant it did not mean lands valuable chiefly for all useful and commercial mineral substances, but such as were valuable only for a few of the rarest minerals.

In other words, that while Congress reserves "mineral lands," it left the meshes in the bottom of the reservation screen large enough to permit passage through to the company of all mineral lands except only gold, silver, copper or lead lands.

Counsel state in their brief (page 7) that it is made clear by a review of the legislation by Congress that

"in no case are non-metal bearing rocks mentioned as 'mineral,' and the laws bear evidence that Congress did not intend to include all common rocks of the country when legislating touching minerals."

We digress here so far as to state with the utmost respect, that we think the learned counsel beg the question by this statement. For the purpose of this case it is not material whether mere "non-metal bearing rocks are mentioned as mineral" or whether Congress did or "did not intend to include the *common rocks* when legislating touching minerals." The material question here is whether large deposits or strata of granite of conceded great commercial value for building and ornamental purposes is mineral in character; and we reply further to the statement of counsel above quoted that the review of the legislation fails to furnish even a hint that Congress ever intended to exclude granite or any other well-recognized, useful and commercial mineral substance from the list of minerals. The learned counsel set forth (pages 8 to 10) a partial list of the acts of Congress relating to the subject. Because, in the earliest acts of Congress providing for a sale of public lands in certain regions it reserved "one-third parts of all gold, silver, lead and copper mines" for future disposal by Congress, counsel argue that this evidences the policy of Congress, thus early, to reserve only gold, silver, copper and lead lands.

We answer, if this be considered as evidence of the future policy of Congress, that it shows the policy to be to reserve only "one-third part of all such lands;" therefore if Congress, in the several grants to the Pacific railroads, departed from this policy in so far as to reserve the whole of such lands we may, with equal force, infer the intent of Congress to go further and reserve the whole of all minerals. One is no greater departure than the other. Furthermore, these earlier enactments, with equal force, evidence the policy of the government to *lease* mineral lands. The truth is, the only minerals understood to exist within the regions covered by these earlier acts were copper and lead, with the probability that gold and silver might be found in limited quantities; and Congress, by reserving every mineral of a commercial value supposed to exist therein, plainly evinced its policy to be not to part with any such minerals. This is so declared by the present Secretary of the Interior, and in the decisions of this court to be hereafter noticed.

The fact that only gold, silver, lead and copper were specifically named in these earlier enactments is not evidence of the policy of Congress not to reserve other minerals, but is evidence that Congress did not know of the existence of any other minerals. This conclusion is supported and strengthened by further examination of the acts of Congress following these earlier enactments. Gradually as the region became peopled, and as Congress became more acquainted

with the resources of the new country, or possessed of knowledge of the existence of any new substance of the mineral kingdom of a commercial value, it enlarged its further reservation by including such newly discovered substances.

This is clearly shown by the review in question. Following the ordinance of the old Confederation of 1785 cited by counsel, the next act was May 18, 1796 (1 Stat., 464), which is the basis of our present rectangular system of surveys. That act required every surveyor to note in his field book the true situation of all mines, salt licks, and salt springs; and reserves for the future disposal of the United States every salt spring to be discovered. This did not refer to open mines only, for this court in *Morton v. Nebraska,* 21 Wall. 675, in referring to this particular act, recognized that the word "mines" there used referred to open as well as hidden mines. The next act following the one of April 16, 1800, cited by counsel, was the act of March 3, 1803 (2 Stat., 235) appropriating money to establish salt works at the salt springs near the Wabash river and authorizing the president to work or lease the spring. It was this act that inaugurated the policy of the United States of leasing mineral lands instead of the act of March 3, 1807, as cited by counsel. Next came the act of March 26, 1804, (2 Stat., 277), providing for the disposal of public lands in Indiana Territory and reserving all salt springs together with sufficient contiguous territory for future disposal by the

United States. The next act was of March 3, 1805, (2 Stat., 343), for sale of lands in Ohio, reserving all salt springs for future disposal, etc., and the next act of April 21, 1806, (2 Stat., 391, Sec. 11), for sale of lands in Territory of Orleans, reserves all salt springs, etc., for future disposal. Further acts not cited by counsel to the same effect are act of February 29, 1808, (2 Stat., 470); act of March 3, 1811, (2 Stat., 663), and act of February 5, 1813, (2 Stat., 797).

The above acts, together with the acts cited by appellant (on page 8 of its brief), it is believed, comprise practically all of the legislation of Congress on the subject prior to the pre-emption act of 1841. Now, some of the substances reserved in these later acts of Congress were not mentioned in the earlier acts, and it could be argued with as much force of reasoning as counsel argued in this case, that Congress had no right to reserve in the later acts substances not mentioned in its former acts. There are many kinds and classes of minerals, metallic and non-metallic, in this country not specially enumerated in any act heretofore passed by Congress, many of which we feel sure counsel will concede, notwithstanding no special mention has ever been made of them, are minerals. The following is a partial list of the more important minerals and metals found in this country which possess commercial value, divided with reference to their metallic and non-metallic character, and though *some* of which are found in leads, lodes, or veins, yet *all* of which are found in

deposits, either in regular or irregular stratified rocks:

METALLIC—Aluminum, antimony, arsenic, bismuth, chromium, cobalt, copper, gold, iron, lead, manganese, mercury, nickel, platinum, silver, tin, tungsten, zinc.

NON-METALLIC—Alum, asbestos, asphalt, with its kindred minerals resulting from oxygenization, such as albertite, grahamite, gilsonite, a valuable mineral found in Colorado and Utah, ozokarite; barytum, or heavy spar; bauxite, a stratified mineral rapidly assuming a commercial importance from the fact that it is from this that the pure alums of commerce are manufactured, and it is also practically the only ore from which aluminum is obtained; borax; bromine; building stone, consisting of sandstone, granite, marble and travertine, the latter being a most valuable stone with which the city of Paris is very largely built; calc-spar for fluxing; cement; chromic iron ore; clay deposits, consisting of brick clay, fire clay, and a still purer deposit called kaolin, for making pottery; coal, whether anthracite coal, bituminous coal, or lignite coal; corundum, (or emery); dolomite, a magnesian limestone, for the conversion of which into a hydraulic cement expensive manufactories are now being constructed in our own state; feldspar, with its kindred minerals; flint; fuller's earth; fluor-spar, which for certain purposes is the best available flux known; graphite;

guano; gypsum; infusorial earth; iodine, a mineral substance commanding a very high price; limestone; marls, marbles, etc.; mica; mineral paints; mineral waters; monazite; natural gas; nitrate of soda; petroleum; phosphate rock; potash; precious stones, such as diamonds, emeralds, opals, rubies and sapphires, etc., and found in dykes or intermingled with ledge matter; pyrites; rutile; salt; silica or quartz, comprising agate, chalcedony, both of which are mined and shipped for commercial purposes; also silica or quartz for making glass; soapstone; sulphur; talc.

Now, if the exception in the grant to the railroad company be only of lands bearing precious metals, then the exception would be limited only to lands bearing gold and silver, (Webster's Dictionary). If the early act of Congress specifying gold, silver, lead and copper only evidences the intention to exempt no other minerals, then all of the other metallic minerals as well as non-metallic minerals, above enumerated pass to the railroad company by the grant, no matter how rich the land may be in such metals or minerals. Suppose that before patent shall issue to the Northern Pacific Railway Company for any of the lands covered by this grant, some portion of them may be found to abound in mines rich in any of the above mentioned metals or minerals, or, which is the case now in the State of Washington, rich in molybdenum, a metal not named above, but necessary in the making of

armor plate, and selling at the present time at one thousand dollars a ton F. O. B. cars, would counsel argue that because this substance was not of the precious metals and was not specifically mentioned in any past reservation of Congress, that therefore the lands containing them are not mineral lands, and pass to the railroad company?

A circular issued November 1, 1901, from the Division of Mining and Mineral Resources, Department of the Interior, compiled under the supervision of David T. Day, Chief of Division, over the signature of Charles D. Walcott, director, showing the mineral products of commercial value of the United States for twenty calendar years, includes each and every one of the above mentioned metallic and non-metallic substances. This has a most significant bearing upon the question in this case. We note that for the four years preceding the date of definite location of this company's right of way the total value of the products of the above mentioned non-metallic minerals exceeded $845,000,000, and that the output has increased yearly, amounting to $550,000,000 for the year 1900, and shows a total for the sixteen years since the definite location of this right of way of over $5,300,000,000 in value. With the exception of the years 1880, 1899 and 1900, the annual ouput of these non-metallic products exceeded the annual output of all the metallic products of the United States. This circular shows

a total value of these non-metallic mineral products, *excluding the value of all coal mined in the United States,* to be in excess of $1,270,000,000 during the past *ten* years only. When we consider that the bulk of these non-metallic products has come from that part of the United States covered by the Pacific railroad grants, and that only a small part of the coal deducted has come from the same territory, the above figures are seen to be far below the real value of the non-metallic mineral products of this territory other than coal during said ten years. Is it not almost unpatriotic to suppose for a moment that Congress ever intended to grant to any private corporation or corporations minerals of such vast value?

We think the statement of the proposition carries its own refutation. The truth is, every succeeding act of Congress containing a reservation at all included in such reservation, either by name or by a generic term, every newly discovered mineral not mentioned in the preceding reservations, and if this course evidence any settled policy of the government at all, it evinces the policy of reserving all minerals of any and every character of a commercial value, where they exist in quantities sufficient to make the land more valuable for that particular substance than for agricultural purposes.

Prior to the Pre-emption Law of 1841 there was no general law for the disposal of public land. All prior

disposals had been under special acts for the purpose, each succeeding enactment broadening the reservation clause so as to include such minerals as were not known to exist, hence, not included in last preceding reservation. The Pre-emption Act excepted "salines or mines." We think the word "mines" is here used in a generic sense to include all valuable mineral substances "open as well as hidden," as stated in *Morton vs. Nebraska, supra.*

Counsel refer to a number of statutes relative to Michigan and Wisconsin, where copper and lead lands are referred to as "mineral lands," and argue from this the interpretation of Congress limiting the meaning of mineral lands to lands containing only these metals. We concede them to be mineral lands and Congress correctly designated them, but they are not the only mineral lands.

We might suggest here that prior to the acquisition of California, we had practically no gold bearing lands, but with the expanding of our boundaries across the huge mountain regions to the Pacific and the discovery of gold, with the consequent migration of our people, and exploration of the country, Congress began to have a hint of the vast and varied mineral resources of the country; that minerals of all kinds, both known and unknown, probably abounded in these mountain regions; consequently, we note a change (if not in policy) then in the custom of Con-

gress in its future enactments with reference to its reservation clauses, for, commencing with 1850, Congress appears to have abandoned the idea of using specific words to designate specific minerals in its reservation clauses, and adopts the generic term "mineral lands." (See the acts set forth and reviewed in appellant's brief, and in this brief).

We think it is fair to conclude that Congress, realizing that it was unsafe to reserve certain classes by special designation, concluded it wiser to use the one generic term "mineral lands" in order that all mineral lands should be included unless especially excepted from the reservation clause, as was the case in the Pacific railroad grants, where they used this generic term, which reserved all minerals excepting certain substances such as coal and iron, which were especially excepted from the reservation.

These earlier acts show the policy of Congress to be that as fast as exploration discovered a new substance it was included in the next reservation; and even assuming that Congress did know of its existence, but failed to reserve it, with the intention that it should pass in any particular instance, it does not follow that Congress did not intend it to be included in the designation "mineral land" later. The mere fact that a substance is not excluded *eo nomine* in one act, does not, *per se*, prove that it is not included in its generic term subsequently used. The burden of coun-

sel's argument seems to be that Congress always referred to land containing precious metals as mineral lands, and therefore no lands are mineral lands unless they contain these precious metals. This conclusion is not deducible from the premises. We admit all such lands are mineral lands, but deny that all mineral lands are such lands. If Congress did not mean to include non-metallic minerals, why did it exempt coal from the grant? The exemption of this non-metallic substance shows conclusively that Congress included both metallic and non-metallic minerals.

Counsel then devote considerable space to a review of the railroad grants, and show grants in aid of sixty-one railroads where no exception or reservation of mineral lands was made, while the exception was made in but few grants, and argue that the reason no reservation was made in those wherein none was made was because the roads aided passed through non-mineral country, and the grants where reservations were made are to roads passing through a known mining country, such as the crossing of our mountain regions. This is not quite accurate; because some of the railroads where no reservation was made passed through some of the best known mining regions at the time, and known to be valuable for particular metals, such as in the Lake Superior regions, and in Michigan and Wisconsin; while in the Pacific grants the region was unknown and unexplored, and Con-

gress while exploring this vast region reserved generally all mineral lands, and also *the right to make future reservations or appropriations prior to definite location.*

Again, many of these railroad grants, where the reservation is contained, are in the same district with railroad grants where no reservation was inserted, showing therefore the reasons of counsel to be unsound. The truth appears, from an examination of the various grants, to be that a line was drawn about 1860; that prior to that time Congress granted the lands to states, and that subsequent to that time, grants with but two exceptions, were made direct to the railroad and that all such railroad grants contained a reservation by the generic term "mineral lands." Counsel say on page 15 of their brief:

"The reason for the exception of minerals in each of these acts is found in the history of the particular grant in question. As to the Pacific roads a general and sufficient reason existed, which was that all of them were to cross the mountain ranges of the west, known at the time to contain precious metals in great quantities. A large proportion of the grants to all the Pacific roads lay in mountainous country which would prove valuable mainly by its production of precious metals."

Now, if it had been the intention of Congress to reserve only the precious metals, why did not Congress expressly enumerate the metals reserved? It had, in prior acts, frequently reserved certain metals

by name. It could just as easily have done the same thing in these acts. The facts, as we contend, were that Congress, supposing these mountainous regions to be rich in mineral resources, not knowing just what minerals subsequent exploration might discover, and intending to reserve them all, whether known to exist or likely to exist, abandoned the policy of specially enumerating certain ones which might be construed to be an exclusion of all others, and used one broad generic term which included everything of mineral character of commercial value. This is further borne out by the history of the legislation furnished by counsel (page 16) to the effect that while the act was under discussion in the Senate, Senator Doolittle called attention of the Senate to the fact that some of the best iron mines of the world were within fifteen miles of Lake Superior. (Cong. Rec. First Session, 38th Cong., part 2, p. 965). He also stated that there were copper mines fifteen miles south of Lake Superior producing as high a percentage of copper as those of the peninsula of Michigan. After this announcement Senator Harlan (p. 1030) moved to amend the bill by inserting in the first section the words "not mineral," and this amendment was adopted. Now, why did Senator Harlan's amendment contain the words "not mineral?" The only mineral alleged to exist was copper and iron. If the policy of Congress was to reserve copper and iron only, or only a few of the recognized mineral sub-

stances, Congress could have said so just as easily as to use this generic term? This is just what Congress has done where it was not its intention to reserve all the minerals; for in the act of July 13, 1866 (14 Stat., 94), granting land to a railroad, it reserved only land "containing gold or silver." Again, by act March 2, 1867 (14 Stat., 548), granting land to another railroad, the reservation was of "all lands containing gold or silver or copper." Now, if it is true, as counsel assume, that Congress used the words "minerals" or "mines" or "mineral lands" as synonymous or interchangeable with "gold, silver, copper and lead," etc., then this last reservation of only "gold, silver or copper" included the other metal "lead" also. Will counsel contend for a moment that mines valuable for a lead mineral were reserved by the act last cited? They certainly will not. We here have the strongest and plainest evidence of the legislative intention, that when *all* minerals were not reserved Congress mentioned specifically what ones were reserved. Counsel say (page 17):

> "If Congress had supposed for a moment that stone land was 'mineral land,' no reason is apparent why the exception should not have been incorporated in all of the grants."

To which we reply that if Congress had intended that a substance recognized throughout the world as a mineral substance and of great commercial use and value, should *not* be excluded from its grant, it could

have excepted it *eo nomine*, as it did iron and coal. The Circuit Court of Appeals in *N. P. R. R. Co. v. Sanders*, 49 Fed., 136, speaking with reference to this subject, used the following language:

"The country at large had an interest to be subserved by the early discovery of all the mines contained in lands liable to be claimed by the plaintiff under its grant, and it is folly to suppose that if Congress had intended, contrary to the public interest, to prohibit the prospecting of a vast area of the public land through a region known to be rich in minerals, or to deprive prospectors of the right to claim and hold supposed discoveries until the truth regarding the same could be ascertained in the only practical way—that is by development—requiring time, and involving labor and the outlay of money, it would not positively have said so in plain words."

And again on page 134:

"We hold that claims to mineral lands could be lawfully initiated by discovery, possession, and development, according to the custom of miners and local regulations at and previous to the date of plaintiff's grant."

In *Barden v. N. P. R. R.*, 154 U. S. 288, the construction of this very grant came before the Supreme Court of the United States, which used the following language:

"Grants in aid of railroads before issue of patent have never been held to pass other minerals than iron or coal."

* * * * *

"When the act was passed making the grant to the plaintiff, it would have been impossible to state

with any accuracy what parts of the tract contained minerals and what did not. That fact could only be ascertained after extensive and careful exploration, and it is not reasonable to suppose that Congress would have left that important fact dependent upon the simple designation by the plaintiff of the line of its road, and the possible disclosure of minerals by the way instead of leaving it to future and special explorations for their discovery. * * * They knew that the mineral belt over which the proposed railroad was to pass was almost entirely unexplored. They, therefore, retained from their grant the mineral lands, whether known or unknown, and left the discovery of the minerals to future explorations, and their disposition to future legislation."

Hence, Congress continuously, in each appropriation bill, made appropriations for the exploration of the mineral regions and the ascertainments of the mineral resources of the country.

Later on, in the same opinion, this Court say:

"Nothing will pass to the grantee by implication or inference, unless essential to the use and enjoyment of the thing granted, and that exceptions intended for the benefit of the public are to be maintained and liberally construed."

Hence upon the ground that coal and iron were excepted from the mineral reservation, because it was essential to the use and enjoyment of the thing granted, Congress in the Tex. Pac. R. R. grant, and in all of the Pacific railroad grants provides that coal and iron are not to be construed as minerals. Evidencing the clear intention of Congress, as set forth in the

above quotation, that no minerals should pass excepting coal and iron which were essential to the enjoyment of the thing granted.

The cases cited by counsel from the Courts of California, Nevada and the United States Supreme Court are inapplicable. In some of those cases the question was whether the land contained precious metals in sufficient quantities to be called a mining claim; in others it was a controversy between agricultural and mineral claimants; but in no case was the question of the character of stone lands raised. These cases must be construed with the particular facts and issues involved.

Having now discussed generally the main contentions of appellant as we understand them from its brief, we will recur to and discuss our two propositions in the order of their statement at the beginning of this argument. During the course of this discussion we will have occasion to refer further from time to time, to the arguments of counsel as they may relate to the particular point being discussed.

Now to our first proposition:

I.

This is "mineral land" within the reservation in the grant. Before referring particularly to the language of the statute, we call the attention of the

Court to certain rules which we think are applicable in this discussion. One rule of statutory interpretation which may be considered as settled by the authorities is as follows:

"The mining laws are to be read in the light of matters of public history, relating to the mineral lands of the United States."

Jennison vs. Kirk, 98 U. S., 453.

Another rule which has been settled by numerous decisions of the Supreme Court of the United States is that "where the statute operates as a grant of public property to an individual, that construction should be adopted which will support the claim of the government rather than that of the individual. Under public grants nothing passes by implication. In the clear and explicit language of the statute must be found all that is conveyed by the grant, and when doubt arises the statute must be construed most strictly against the grantee, the Courts holding that nothing is given, in such cases, except that which is clearly given."

3 *Ld. Dec.* 243;

Chas. River Bridge vs. Warren Bridge, 11 Pet. 420;

D. & P. R. R. vs. Litchfield, 23 How. 66;

Rice vs. R. R. Co., 1 Black 360;

Leavenworth R. R. Co. vs. U. S., 92 U. S. 733;

Slidell vs. Grandjean, 111 U. S. 412;

Barden vs. N. P. R. R. Co., 154 U. S. 288.

Another rule of statutory interpretation which has been more frequently declared by the Supreme Court of the United States than any other is that:

"In case of a doubtful or ambiguous law, the contemporaneous construction of the statute by the executive officers whose duty it is to construe it, or those who have been called upon to carry it into effect, is entitled to great respect, and should ordinarily control the construction of the statute by the Courts."

U. S. vs. Moore, 95 U. S. 760;
U. S. vs. B. M. R. R., 98 U. S. 336;
U. S. vs. Graham, 110 U. S. 219;
Brown vs. U. S., 113 U. S. 568;
Pollock vs. Bridgeport, 114 U. S. 413;
U. S. vs. Philbrick, 120 U. S. 52;
Robertson vs. Downing, 127 U. S. 613;
H. & D. H. Co. vs. Whitney, 132 U. S. 365;
Heath vs. Wallace, 138 U. S. 578;
Pennoyer vs. McConaughy, 140 U. S. 23;
Barden vs. N. P. R. R. Co., 154 U. S. 288.

Mr. Lindley in sections 90 and 91 of his excellent work on "Mines and Mining," after reviewing the various decisions, deduces therefrom the following additional rule of interpretation:

"The word 'mineral' when used in an Act of Congress, must be understood in its widest signification, unless there be something in the context or nature of the case to control its meaning, and when the words 'mines' and 'minerals' are both used in the same statute, the word 'mineral' is not on that account to suffer limitation of its meaning."

Now, in the light of these rules, which we claim are thoroughly established, let us return to the discussion of our first proposition, that lands valuable only for granite or building stone of a good commercial quality are "mineral lands" within the act of Congress.

It is claimed by the complainant that prior to the Act of 1864, Congress had made no provision for the disposal of mineral lands. Even conceding this to be true, it is nevertheless notorious that for years prior to that time mineral lands had been located, mined and disposed of under certain rules and customs pertaining to the district within which the same were located. All of these rights have been repeatedly recognized by Acts of Congress and by decisions of the Supreme Court of the United States, so that under one of the rules of interpretation above laid down, this law exempting mineral lands must be read in the light of matters of public history.

LEGISLATIVE ACTS.

We have heretofore referred to the legislation of Congress up to the Pre-emption Act of 1841. That act excepted from settlement lands on which "are situated any known saline or mines." Counsel contend that the word "mines" as here used, is a limitation of the meaning of the words "mineral lands";

that it confines "mineral lands" to only such substances as gold, silver, copper, cinnabar, lead, etc.

Again, under the act of September 27, 1850 (9 Stat. 496), granting land to settlers in the Territory of Oregon, commonly known as our "Donation Act," the exception is "mineral lands, and lands reserved for salines."

It will be noticed that in place of the word "mines" as used in the Pre-emption Act, the term "mineral lands" is used in this act. But because the term used designating the lands excepted is different in the latter from the former, counsel conclude "the term 'mineral lands' here employed must therefore be assumed to be the equivalent of the term 'mines' under the Pre-emption Act."

Counsel's conclusion is wrong. The terms "mines" and "mineral lands" are not interchangeable as contended, but the truth is that "mineral lands" as used in the Donation Act was understood by Congress to mean lands unfit for agricultural purposes. For Congress, in the act, provides for the survey into townships and sections of all that region lying between the Cascade range and the Pacific ocean, both north and south of the Columbia river. Concerning this work, however, the act contained a significant exception (in Sec. 3) to the effect that none other than township lines shall be run when the land is deemed *unfit for cultivation*. Now Congress, by

subsequent statute, has declared what kind of lands it meant by lands "unfit for cultivation"; for in 16 Stat., p. 217, Sec. 16, Congress enacted that so much of the Donation Act as provided that none other than township lines shall be surveyed "*where the lands are mineral*" is repealed, and the public surveys are extended over all such lands.

Now to repeat—In the Donation Act, Congress provided that where the land is "*unfit for cultivation*" none but township lines need be run, while later it repealed so much of the Donation Act as provided that none but township lines need be run "*where the lands are mineral.*" This we contend is an interpretation by Congress of the language.

Again, the Act of March 3, 1853 (10 Stat. 244), providing for the survey of public lands in California and granting pre-emption rights therein, provided that "none other than township lines shall be surveyed where the lands are mineral." Here, in this act relating to the lands in California, Congress was making the same provisions concerning the running of township lines as it made in the Donation Act, concerning Oregon. It uses the words "mineral lands" and "lands unfit for cultivation" as interchangeable.

The exception from entry of lands under the California act is of "mineral lands."

Counsel, in their brief, claim that the use of the words "mineral lands" in this exception "had no different or other signification than the term 'mines' used in the pre-emption law." Under one of the well known rules heretofore laid down, the interpretation of these laws by the land department of the Government is entitled to great weight. What is the interpretation put upon this law? After the passage of this California act, instructions were issued by the land department to the various land offices. The instructions declared (1 Lester's Ld. Laws, 689, par. 8), that there are excepted from the operation of the act by the term "mineral lands," "all lands on which are situated any known salines or mines." Now, what does this interpretation mean? It means that mineral lands include *salines* which do not belong to the precious metal class of minerals. It also holds that mineral lands *include* "known mines." It does not mean that it *excludes* unknown minerals; for if it excludes unknown minerals, then it also would exclude unknown mines, though such unknown mines might be rich in gold, silver, etc.

The Secretary of the Interior, in his instructions (2 Lester, 304) holds that the word "mines" as used in the Pre-emption Act of 1841, embraces tracts containing coal, "which are to be treated as mineral lands."

Here is a declaration of the policy of the United States to include other than metalliferous substances.

Fortunately we are not without authority as to the meaning of the term "mineral lands." The act for the disposing of coal lands was passed July 1, 1864 (13 Stat. 343), which act has been declared to be a legislative interpretation of the words "mines" and "mineral lands" as theretofore used by Congress.

At this point our views are better expressed in the language of Secretary Bliss as found in the case of *Pacific Coast Marble Company vs. Northern Pacific Railroad Company and the State of Washington*, 25 L. D. 237, which case is exactly in point with the case at bar save the substance in dispute in that case was marble, wherein here it is granite.

The Secretary says:

"It is contended that what Congress meant in this act by the term 'mines' must be gathered from the preceding uniform policy as set forth in the legislation on the subject of mineral in the public lands; and it is claimed that such policy is distinctly indicated by the preceding legislation which reserved to the United States 'lead mines and salt springs, absolutely, and a one-third part of all gold, silver, lead and copper mines' or, excepting salt springs, minerals of the metallic class only. This preceding legislation is referred to as being embodied in a certain ordinance of the Congress sitting under the Articles of Confederation, passed May 20, 1785, and in certain acts of the Congress under the Constitution, passed at various times, down to and including the year 1816.

"It is to be observed, however, that in the act of July 1, 1864 (13 Stat. 343), providing for the disposal of coal lands in the public domain, Congress gave, on this point, its own definition of the term 'mines' as used in the former Pre-emption Act, by declaring that, 'Any tracts embracing coal-beds or coal fields, constituting portions of the public domain, and which, as "mines" are excluded from the Pre-emption Act of eighteen hundred and forty-one,' might be sold under the terms therein prescribed.

"Coal is a non-metallic mineral, and we have here an express declaration of Congress that the same is included within the meaning of the stated exception from said Pre-emption Act.

"In the case of *Mullan vs. United States* (118 U. S., 271) the question was, whether coal lands are mineral lands within the meaning of the statutes regulating the disposition of the public domain. The Court, after referring to the Pre-emption Act of 1841, and the Coal Act of July 1, 1864, said, of the provision herein above quoted from the latter act:

" 'This is clearly a legislative declaration that "known" coal lands were mineral lands within the meaning of that term as used in statutes regulating the public lands, unless a contrary intention of Congress was clearly manifested.'

"Here we have both a legislative declaration, and the highest judicial determination, that the term 'mineral lands' in the public land laws does include minerals other than those of the metallic class."

Now this act for the disposing of coal lands which has been declared, as we have seen, both by the Secretary of the Interior and by the Supreme Court of the United States, to be a legislative declaration that mineral lands include not only metalliferous but fossiliferous substances, was passed a day prior to

the grant to the Northern Pacific railroad. Hence, we have a right to presume that when Congress used the word "mineral" in this granting act on the following day, it used it in the same sense, and with the same interpretation placed thereon by itself the preceding day, and by standard authorities and common law courts prior to the grant. Therefore, let us briefly inquire into the meaning of the word as commonly understood at that date.

Bainbridge on Mines, 4th Ed., p. 1, uses the following language:

"A mineral has been defined, in the narrow sense of the word, to be a fossil or what is dug out of the earth, and which is predominantly metalliferous in character. The term may, however, in the most enlarged sense, be described as comprising all the substances which now form, or which once formed, part of the solid body of the earth, both external and internal, and which are now destitute of and incapable of supporting animal or vegetable life. In this view, it will embrace as well the bare granite of the high mountains as the deepest hidden diamonds and metallic ores."

Stewart on Mines, p. 9, uses the following language:

"Both scientifically and popularly the term 'mineral' has been applied to substances whose chemical and physical properties are sufficienly uniform to admit of identification and classification, whether they exist in a mine or upon the surface of the ground."

In Sweet's Dictionary of English Law we find the following definition:

"In the most general sense of the term, minerals are those parts of the earth which are capable of being got from underneath the surface for the purpose of profit."

A few illustrations from comparatively recent English and American authorities decided prior to the act of 1864 will enable us better to understand the signification given to the term "mineral" by the English and American Courts at the time of the passage by Congress of the various statutes prior to this grant.

In the case of the *Earl of Rosse vs. Wainman*, 14 M. & W. 859, the highest Courts of England in 1845 passed upon this question. The facts are as follows:

One Jackson was seized in fee of the Manor of Shipley, within which there were several commons or parcels of waste ground. Parliament passed an act reciting that Jackson was lord of the manor, and as such was owner of the soil of the said commons and entitled to all mines and minerals within and under the said common, and reciting further that said Jackson and several other persons were owners and proprietors of estates within the manor, and in respect thereof were entitled to right of common and other rights and interests in and upon the common. It was accordingly (among other things) enacted that the said commons and waste ground should be divided

and allotted among the persons entitled thereto in lieu of and as a full recompense for all right and interest in and to the soil of the commons. It was further enacted that Jackson "should and might, from time to time, and at all times thereafter, have, hold, win, work, and enjoy exclusively all mines and minerals, of what nature or kind whatsoever, within and under said commons and waste ground, * * * with full and free liberty, power, and authority of digging, sinking, searching for, winning and working the said mine and minerals, and leading and carrying away the lead ore, lead, coals, ironstone and fossils, etc."

We call attention to the fact that the act specified ironstone, but does not specify stone.

The Commissioners appointed by the act made their award and allotted and awarded unto the heirs or devisees of Wainman in lieu of his rights in the commons certain enclosures of land. Beneath the lands enclosed, and so awarded or allotted to Wainman, there was in some places the stone common to the district, not the iron-stone mentioned in the act. The defendant agreed to sell this stone to certain stone merchants, who commenced working the land and raised, severed and took away a number of cubic yards of the stone, whereupon the plaintiff being the successor of Jackson, claimed that, as lord of the manor, he was entitled to the stone. The defendant denied the plaintiff had such right, whereupon the

plaintiff caused this action to be brought and the question for the opinion of the Court was whether the plaintiff is entitled to the stone so gotten and raised.

The Court say:

"In our opinion, the right to the stratum of stone was reserved to the lord, and consequently the plaintiff is entitled to recover."

The Court, after then considering the act and its reservation of mines and minerals, etc., used the following language:

"The term 'minerals' here used, though more frequently applied to substances containing metals, in its proper sense, includes all fossil bodies or matters dug out of mines; and Dr. Johnson says that 'all metals are minerals, but all minerals are not metals; and mines, according to Jacob's Law Dictionary, are 'quarries or places where anything is digged.' Beds of stone, which may be dug by winning or quarrying are therefore properly minerals, and so we think they must be held in the clause in question."

Here is a legal definition defining "mines" to embrace "quarries."

Again, in 1851, the Courts of England passed upon the same proposition in the case of *Micklethwait vs. Winter*, in 6 Ex., p. 644.

The facts in this case were as follows:

Micklethwait was seized in fee of the Manor of Ardsley, and of the common and waste land or

grounds within and parcel of the said manor. There was within the manor a considerable tract of common or waste land or ground, the soil or freehold of which was vested in Micklethwait subject to certain rights of common of pasture. The coals and minerals and other substances under the surface of the common belonged to him as part of the soil or freehold so vested in him, and he was entitled to win and work the said coals and minerals.

Parliament passed an Act for dividing and enclosing the open Common. The Act provided that the Lord and all persons claiming under him as lords of the Manor—

"Should at all times thereafter hold and enjoy all rents, services, rights, royalties, etc., belonging to the said lord of the Manor in as full, ample and beneficial manner as they might have held and enjoyed the same in case the Act had not been made."

It will be noticed that this Act did not in terms reserve to the lord any right to the mines or minerals, but simply all such rights, royalties, etc., as he would have possessed had the Act not been passed; it further provided, in the event he should enter for the purpose of taking any of the *coals* or *other minerals* he should pay the owner to whom the lands were allotted, damages. A certain part of the Common was awarded to one Crookes in lieu of certain rights or interests to which he was then entitled. The defendant, who

was the successor of Crookes, opened a quarry in his allotment and dug and raised out of the quarry and converted to his own use large quantities of stone, grind-stone, etc. The plaintiff, as lord of the Manor, claimed the stone as having been found beneath and having been, before the passing of the said Act, part of the said common or waste land. This claim the defendant denied. The question for the opinion of the Court was "whether the plaintiff is entitled to the said stone or not." In the argument the defendant's counsel claimed that the phrase "coal or other minerals" in the Act "means only such materials as resemble coal, or such minerals as are taken from mines, not out of quarries, and that stones are not within the definition of minerals."

Each of the judges delivered a separate opinion in which all concurred that stone was a mineral.

In *Midland Railway Co. vs. Cheekley*, L. R. 4, Exq. 19, the question was whether stone for road making or paving was a mineral. It arose upon a reservation, in the Canal Act, of Mines and Minerals within and under the lands through which the canal was to be made. Lord Rommily, Master of the Rolls, said:

"Stone is, in my opinion, a mineral, and, in fact, everything except the mere surface which is used for agricultural purposes. Anything beyond that, which is useful for any purpose whatever, whether it is mar-

ble, fire-clay, or the like, comes within the word mineral, when there is a reservation of the mines and minerals from a grant of land."

In *Midland Railway against Haunchwood, B. & T. Co.*, L. R. 20, Ch. D. 552, the controversy arose under the Acts of Parliament, known as the "Railway Clauses Acts," and the question was whether or not *brick clay* was a mineral. The statute provided that the Company

"Shall not be entitled to any mines of coal, etc., or other minerals under any land purchased by them, except only such as shall be used in the construction of the works; and all such shall be deemed excepted out of the conveyance."

Mr. Justice Kay said that minerals meant, primarily, all substances other than the agricultural surface of the ground "which may be got for manufacturing or mercantile purposes, whether from a mine, as the word would seem to signify, or such as stone or clay, which are gotten by open working."

In a leading case on this subject in England, *Hext vs. Gill*, L. R. 7, Ch. App. 699, the substance in dispute was *china clay* (Kaolin, sometimes called porcelain, or fire clay). The grant of the freehold, which was executed in 1799, reserved "all mines and minerals within and under the premises, with full and free liberty of ingress, egress to dig, search for, take, etc." The House of Lords in this case announced the rule that a reservation of "minerals" includes

"Every substance which can be obtained from underneath the surface of the earth for the purpose of profit, unless there is something in the context, or in the nature of the transaction to induce the Court to give it a more limited meaning."

This decision was subsequently followed and approved in the later case of *Attorney-General vs. Tomline*, L. R. 5, Ch. D. 750.

In the case of *Attorney-General vs. Welsh Granite Co.*, 35 W. R. 617, the question was whether the term "mineral" as used in the enclosure Acts of Parliament passed in 1812 included *granite*. The Master of the Rolls, after reviewing the authorities, said:

"It is evident from these cases that minerals mean substances which can be got from beneath the surface, not by mining only, but also by quarrying, for the purpose of profit."

In the *Magistrates of Glasgow vs. Farie*, L. R. 13 App. Ch. 294, which was a case before the House of Lords, involving the interpretation of a reservation in an Act of Parliament of 1847, authorizing the construction of water works, wherein it was provided that the undertakers of the project shall not be entitled to any mines or minerals under any lands, etc., Lord Herschel announces his views as follows:

"I think the reservation must be taken to extend to all bodies of mineral substance lying together in seams, beds, or strata, as are commonly worked for profit."

In *Bell vs. Wilson*, 2 Drew & S. 395, the question arose as to whether *freestone*, that is, *sandstone*, was within the exception in a lease of "mines and seams of coal, metals, or minerals, as well opened as not opened," and it was held that it was within the exception.

The same substance, viz.: *sandstone*, was held, in the case of *Jamieson vs. North British Railway Co.*, 6 Scot. L. Rep. 188, to be within the "Railway Clauses Acts," which exempted mineral from the grant to the Railway.

The decisions in the English Courts wherein limestone has been held to be a mineral are numerous.

The case of *Tucker vs. Linger*, L. R. 8 App. C. 508, arose in the House of Lords. The question was whether *flintstones* turned up with the plow in the course of husbandry were within the exception or reservation in a lease, of mines, minerals, quarries of stone and gravel pits, and the House of Lords held that it was within the exception. In the cases of *Duchess of Cleveland vs. Myrick*, 16 W. R. 104; *Ruabon Brick & Terra Cotta Co. vs. Great Western Ry. Co.*, L. R. 1 Ch. 427; *Errington vs. Met. Ry. Co.*, L. R. 19, Ch. D. 559; *Attorney-General vs. Mylchreest*, 4 App. C. 294, the question was in each case whether *clay* was a mineral and within the reservation or exception in the "Railway Clauses Acts," excepting mineral, and the Courts decided that it was.

Lindley in his work on Mining and Mines, says in Sec. 90:

"That under the French and Belgium system a mining concession includes whatever mineral substance is susceptible of profitable working."

We now cite the Court to a few of the leading American authorities interpreting the word "mineral:"

Lindley, in Sec. 98, gives the following rules for determining the mineral character of lands:

"While it is difficult to formulate a definition sufficiently comprehensive in itself to cover all possible exigencies, we think that a conservative application of the rules governing statutory construction, heretofore enumerated in connection with the adjudicated cases and rulings of the land department, permits us to deduce the following:

The mineral character of the land is established when it is shown to have upon or within it such a substance as—

(a) Is recognized as mineral, according to its chemical composition, by the standard authorities on the subject; or—

(b) Is classified as a mineral product in trade or commerce; or—

(c) Such a substance (other than the mere surface which may be used for agricultural purposes) as possesses economic value for use in trade, manufacture, the sciences, or in the mechanical or ornamental arts;—

And it is demonstrated that such substance exists therein or thereon in such quantities as render the land more valuable for the purpose of removing and

marketing the substance than for any other purpose, and the removing and marketing of which will yield a profit; or, it is established that such substance exists in the lands in such quantities as would justify a prudent man in expending labor and capital in the effort to obtain it."

CONSTRUCTION OF THE LAND DEPARTMENT.

The land department of the United States early announced the doctrine for which we contend. With the exception of two or three cases to be hereafter more particularly referred to and which were subsequently vacated, this has been the settled and uniform policy and construction of the land department. Counsel appear to discover some confusion in the decisions of the land department, but we will show this confusion does not exist.

Let us commence at the beginning of the land decisions of the department and examine them down to date.

In the case of *W. H. Hooper*, I. L. D. 560, the department lay down the following rule:

"Whatever is recognized as mineral by the standard authorities, where the same occurs in quantity and quality to render the land in question more valuable on its account than for agricultural purposes, is mineral within the meaning of the mining laws."

In this case it was decided that borax, carbonate and nitrate of soda, sulphur, alum and asphaltum were minerals and might be acquired under the mineral laws in California. This is contrary to the contention of counsel that under the statute excepting mineral lands in California nothing was excepted save the precious metals.

Among the substances other than those of a metallic character, which have been classified as mineral by the land department of the United States, we note the following:

ALUM: C. M. L. 50; 1 L. D. 561, 572; 2 L. D. 707;

ASPHALTUM: C. M. L. 50; 1 L. D. 561, 572;

BORAX: C. M. L. 50, 100; 1 L. D. 561, 572; 2 L. D. 707; C. M. L. 194; 1 C. L. O. 11;

GUANO: 27 L. D. 95;

DIAMONDS: C. M. L. 88; 1 L. D. 88;

GYPSUM: C. M. L. 309; 1 L. D. 560; *Phifer vs. Heaton*, 27 L. D. 57;

KAOLIN, or Fire Clay: C. M. L. 121, 176, 209; 1 L. D. 565; *Montagu vs. Dobbs*, 9 C. L. O. 165;

MARBLE: C. M. L. 176;

MICA: C. M. L. 182;

CARBONATE and NITRATE OF SODA;

SULPHUR and ALUM: C. M. L. 50; 1 L. D. 561, 572; 2 L. D. 707;

SLATE for roofing purposes: C. M. L. 143; 1 C. L. O. 132;

UMBER: C. M. L. 161;

PETROLEUM and the mineral hydro carbons: C. M. L. 160; 1 C. L. O. 189; 2 C. L. O. 66; 8 C. L. O. 120; 2 L. D. 707; 4 L. D. 60, 284; 16 L. D. 117; 25 L. D. 351;

LIMESTONE, Building Stone, etc.: 2 C. L. O. 66; 8 C. L. O. 120; 9 C. L. O. 5; 10 C. L. O. 50; C. M. L. 176, 309, 509, 510; 12 L. D. 1; 16 L. D. 508; 17 L. D. 82;

PHOSPHATES: *Gary vs. Todd,* 18 L. D. 58;

COAL: *McKeen vs. Buell,* C. M. L. 343; *Townsite of Colville,* 4 C. L. O. 46; *in re Norager,* 16 C. L. O. 54;

SALT Lands are classified as mineral and held to be reserved from railroad grants: *Eagle Salt Works,* C. M. L. 336;

BUILDING STONE and STONE of a special commercial value has frequently been the subject of decision in the land department, and also in the various courts of this country. See cases cited in C. M. L., 2 Ed. pp. 509, 510.

In *Maxwell vs. Brierly,* Secretary Teller held that:

"Land more valuable for its deposits of stone, or whatever is recognized as mineral, than for agriculture, is mineral land."

In the case of *H. P. Bennett, Jr.*, 3 L. D. 116, the question before the General Land Office was, whether or not land covered by high cliffs of granite or rock, and valuable only for its granite, was mineral land, and it was held to be such. This ruling was followed consistently by the land department for a number of years, but counsel cite *Conlin vs. Kelly* in 12 L. D. 1, as a case in conflict, wherein counsel say "It was held that a species of granite, called jasper, valuable for building purposes, is not a mineral under the mining laws."

We submit on close examination that the facts in this case do not justify the counsel's interpretation; the facts are easily distinguishable. Kelly had pre-empted his land and made final payment. *Seven* years afterward, Conlin filed a contest charging fraud and claiming that the land was valuable for mineral and that Kelly had pre-empted it for the purpose of acquiring the stone. It was shown on the trial that the mineral which it was claimed the land contained was unstratified rock, breaking with irregular fractures "fit only for foundations or use in cellars or other places where strong, rough work is required, but possessing little commercial value."

This case approves the decision in *Maxwell vs.*

Brierly, which case, as we have seen, held that limestone used only for fluxing in a nearby furnace was mineral. In the decision the Secretary uses the following language:

"The stone in the tract in controversy has no peculiar property or characteristic that gives it a special value such as attaches to gypsum, limestone, mica, marble, slate, asphaltum, borax, fire clay, kaolin or petroleum."

We think that the language quoted is a holding that stratified granite or rock valuable for building or commercial purposes is a mineral.

Again, the fact that Kelly made final payment seven years before, was quite a factor in the refusal of the Secretary to set aside his filing.

But during the following year in the case of *McGlenn vs. Winebrower*, 15 L. D. 370, wherein the question was whether stone is a mineral, the Assistant Secretary who rendered the opinion in *Conlin vs. Kelly*, distinguished the facts and uses the following language:

"The term 'mineral' is more frequently applied to substances containing metals, but in its proper sense, includes all fossil deposits or matters dug out of mines; in this sense beds of stone may be included in the word 'mineral.' * * * Stone taken from quarries is mineral."

This decision is followed in later cases.

Counsel cite *Hayden vs. Jamison*, 16 L. D. 537, as against our proposition. Let us examine this.

There are three cases of *Hayden vs. Jamison*. The facts were these: Jamison made a homestead entry on the land in September, 1889. In the same month Hayden with others, made a placer location for 120 acres of the land. The first case is in 15 L. D. 276, prior to the one cited by counsel. The evidence showed the "chief value of the land was for red sandstone suitable for building purposes, paving and curbstone." In this first decision the land department held such lands to be mineral lands. Upon a re-trial, in 26 L. D. 373, the department appears to have decided to the contrary; but upon a review of the case before Secretary Bliss March 12, 1898, the Secretary finally disposed of it. He follows the decision in the *Pacific Coast Marble Company vs. N. P. R. R. Co.*, and repeats with approval the definition of mines and minerals from Bainbridge heretofore quoted in our brief, and stated as follows:

"Unquestionably the great weight of authority is to the effect that sandstone is a mineral substance."

Accordingly he cancelled the homestead entry of Jamison, *vacated* the decision cited by counsel from 16 L. D., and permitted the placer entry of Hayden, although this placer entry was made three years prior to the act of 1892.

Clark vs. Erwin, 16 L. D. 122, is cited by counsel. In that case the land contained valuable building stone, but much of the land was also suitable for agricultural purposes, and the Secretary, while recognizing building stone as a mineral, held that under the circumstances and facts of the case, the same might be taken under agricultural lands. He does not deny the proposition that lands chiefly or only valuable for stone are not enterable under the mining laws.

The case of *South Dakota vs. Vermont Stone Company,* 16 L. D. 263, occurring a few days later, is a case in which the facts are similar to the facts, and the stone is of the same character as the stone in *Conlin vs. Kelly,* and it is expressly based upon the authority of *Conlin vs. Kelly.*

Counsel also cite the case of *Elias Jacobs,* 7 Copp's Land Owner, 83, as authority for their contention that limestone was not excepted from the grant to the Southern Pacific Railroad Company. This case was repudiated by numerous later decisions of the department cited *ante* under the substance "Limestone" in our specification of substances and later, as learned counsel concede, it was overruled in *Marble Company vs. N. P. R. R. Co.,* hereafter more particularly examined. This is certainly a repudiation by the department of the doctrine for which counsel contend.

But to set matters at rest and remove any doubts, Congress passed the act of 1892, permitting stone to be taken under the placer mining laws. This was an interpretation by Congress, we think, and a Congressional approval of the previous long continued holdings of the land department. The Secretary of the Interior in his instructions to the registers and receivers concerning this act, says (15 L. D., 360):

"It is not the understanding of this office that the first section of said act withdraws land chiefly valuable for building stone from entry under any existing law applicable thereto."

In view of this instruction and construction of the Secretary of the Interior, the counsel's contention that, prior to this act, stone lands were not purchaseable under the mineral laws, falls to the ground.

Concerning the passage of this Act of 1892, Lindley, in Sec. 421, uses the following language:

"The passage of the act of Congress referred to, occurring as it did subsequent to Assistant Secretary Chandler's first ruling, was a legislative affirmance of the theory of interpretation applied to other classes of non-metallic substances, and a recognition of the rule which has for its foundation the element of commercial value. More than once Congress has intervened when the department has undertaken to disregard this element, by applying arbitrary rules to individual cases."

Less than six months after the decision in the case of *Clark vs. Irwin*, and *South Dakota vs. Ver-*

mont Stone Co., the question again arose in the case of *Van Doren vs. Plested*, 16 L. D., 508. In this case the Secretary criticises the case of *Conlin vs. Kelly*, and held that lands containing deposits of sandstone, valuable only as a stone quarry, are mineral lands. He uses the following language:

"Under the law as it existed prior to the Act of 1892, lands containing deposits of sandstone of quality for building and ornamental purposes, and valuable only as stone quarries, might be entered as placer claims under the general mining laws."

And in the later case of *Paris vs. Gibson*, 21 L. D. 329, Secretary Hoke Smith refused to follow the case of *South Dakota vs. Vermont Stone Company*, saying:

"Contemporaneously with the passage of the Act of July 9, 1870, the Land Office held that lands chiefly valuable for building stone were mineral lands, and subject to location as placers."

Counsel also cite *Jordan vs. Mining Co.*, 20 L. D. 500, as authority that aluminum is not a mineral. This case is not in point. The formation was brick clay, and the Secretary found that alumina "does not exist in paying quantities," and in any event the "deposit was not such as would impress a mineral character upon the land."

As the latest and best reasoned case wherein this same question in this same grant, and against the

same Railroad Company is involved, we cite from the very able opinion of Secretary Bliss in *Pacific Coast Marble Co. vs. Northern Pacific Railroad Company*, 25 L. D. 244. In this case the learned Secretary says:

"Ever since the enactment of the mining laws, however, as has been shown, the construction by the Land Department, with practical uniformity, has been the other way. The more liberal view was early adopted and has since prevailed to the extent that many titles to lands patented as mineral, though of the non-metallic class, are now depending upon it. This view having been generally accepted for so long a time, and property rights having grown up under it, there should be, in my judgment, the clearest evidence of error, as well as very strong reasons of policy and justice controlling, before there should be a departure from it. * * * It may be well to note in this connection, that soon after the decision in the case of *Conlin vs. Kelly, supra*, wherein lands containing stone, useful only for building purposes, were held not subject to the operation of the mining laws, Congress, by Act of August 4, 1892 (27 Stat., 348), especially declared that lands 'chiefly valuable for building stone,' should be enterable 'under the provisions of the law in relation to placer mineral claims.' It would thus seem that Congress regarded even the ruling in that case as a departure from the liberal construction theretofore adopted by the Land Department, to such an extent as to demand legislative action disapproving the result thereof.

"Sufficient has been said to show what has been the long-continued practice of the Land Department, and to point out the danger and harmful results of a departure from that practice at this late day. Independently of these things, however, it may be added that the construction, as an original proposition, ap-

pears to be clearly right. The Department, therefore, in concluding this branch of the case, adheres to the rule:

"That whatever is recognized as a mineral by the standard authorities on the subject, whether of metallic or other substances, when the same is found in the public lands in quantity and quality sufficient to render the land more valuable on account thereof than for agricultural purposes, should be treated as coming within the purview of the mining laws.' "

It will thus be seen that the Land Department of the Government has universally held stone to be a mineral.

Further as touching the policy of the Government see "Report of the Public Lands Commission" made pursuant to Act of March 3, 1879. The public lands were classified into five classes:

(1) Arable lands;
(2) Mineral lands;
(3) Irrigable lands;
(4) Pasture lands;
(5) Timber lands.

Now, under which head was stone included? Stone lands were known to exist. Fortunately, the Commission enlighten us, for on page 21, they say:

"The Commission has endeavored to carefully define the five classes of land above enumerated so that each distinction should be properly *inclusive and exclusive.*" (Italics our own.)

Now, if these classes are to be *inclusive and exclusive*, then the mineral lands must include stone lands and all other lands chiefly valuable for mineral, and *exclude* every other character of land; the other classes being *inclusive and exclusive, exclude* all lands chiefly valuable for mineral.

Counsel's argument that stone was not considered a mineral, because no law was provided under which the same could be obtained, is without force. The mere fact that no law existed under which stone lands could be patented does not signify it is not mineral land. Prior to 1866, no law existed for the disposal of gold and silver claims, and Congress never authorized the disposal of a foot of such lands; yet they were mineral nevertheless, and were taken, worked, sold, traded, and formed subjects of barter and exchange between citizens for 18 years prior to any law authorizing such. Admitting, for the sake of argument, that stone claims could not be taken under the mining laws this fact does not make them non-mineral. Congress reserved mineral lands, though for years after such reservation, it may not have provided for the disposal of them. The mere reservation of lands, with no provision for disposal, does not make the reserved lands non-mineral.

McFadden vs. M. V. M. & M. Co., 97 Fed. Rep. 679.

Let us now examine the contention of the counsel that while stone may be mineral within the mean-

ing of Congress, yet stone lands are not "mineral lands" within the exception in its grant to Railroads, and to States, a distinction, in our opinion, more fanciful than real. Here again, we can better express our views by quoting from Secretary Bliss in the case of *Pacific Coast Marble Company vs. Northern Pacific Railroad Company, supra.*

"At the very threshold of the discussion of this branch of the case, we are met by the aforesaid act of July 1, 1864, passed the day before the grant to the railroad company was made, wherein it was declared that coal—a non-metallic mineral—is within the exception of mineral lands in the pre-emption act of 1841, and with the case of *Mullan vs. United States, supra,* holding that this was a legislative declaration to the effect that coal lands are mineral lands within the meaning of that term as used in statutes regulating the public lands unless a contrary intention is clearly manifest. This legislative interpretation of the word 'mines,' used in the pre-emption act, as including non-metallic minerals, given the day before the grant to the railroad company was made, is very significant, and would seem to negative all idea that Congress intended by the use, the next day, of the term 'mineral lands,' in said grant, to include thereby only lands containing the metalliferous minerals. The larger and more comprehensive meaning would seem clearly to have been intended, in the absence of anything plainly manifesting a contrary purpose.

Again, the proviso in the excepting clause of the Company's grant, that the word 'mineral,' when used in the act shall not be held to include *coal* and iron, clearly shows the mind of Congress on the subject. If the purpose had been to except from the grant only lands valuable for metalliferous minerals, there would have been no necessity for said proviso as to coal; and

if the exception of mineral land would have included coal, as must be admitted, there is no apparent reason why the exception may not include any other fossiliferous mineral substance, if the lands containing it are chiefly valuable on that account. The contention that this would make the exception co-extensive with the grant, is fully answered by the condition that in all cases the lands must be *valuable* for their minerals, which, under a long line of decisions, has been held to mean: chiefly valuable for minerals, or, which is the same thing, more valuable on that account than for agricultural purposes. There is nothing in the act making the grant to this company, nor in any contemporary legislation on the subject of which the Department is aware, that clearly manifests an intention on the part of Congress to restrict or limit the meaning of the term 'mineral lands,' as used in said grant to metalliferous minerals only. The same may be said of the grant to the State."

In *A. & P. Railway Company*, 12 L. D. 116, the Secretary of the Interior appears to construe the grant to the Railroad Company as passing only land suitable for agricultural purposes, and as excluding from the grant land valuable chiefly for commercial mineral substances, and directs that there be carried in the patent a clause expressly excluding therefrom "all mineral land other than coal or iron lands."

Again the Secretary of the Interior in his instructions to the various land officers, in July, 1894, 19 L. D. 21, relating to selection by Railroad Companies of lieu lands requires the Companies to show by affidavit the mineral or agricultural character of the lands.

Counsel also cite the case of *Tucker vs. Florida Railway & Navigation Company*, 19 L. D. 414, which holds that the exception of mineral lands to the Railroad Company did not include phosphate deposits. The facts of this case are not parallel, as one of the acts under which the lands were selected, contained no exception whatever, and besides it is squarely in conflict with the decision of the same Secretary in *Gary vs. Todd*, 18 L. D. 58. But it is useless to spend further time in distinguishing the case, for the same is re-examined and as learned counsel concede, is squarely over-ruled by a later decision of the Interior Department in the *Pacific Coast Marble Co. vs. Northern Pacific Railroad Company*, 25 L. D. 247. It is again reviewed in 26 L. D. 600 and *vacated*.

Another case cited by the counsel is *Union Oil Co.*, 23 L. D. 222, wherein Secretary Smith, the same who rendered opinion in the Tucker case, held that petroleum land in California, was not within the exception of mineral lands in the grant to the Southern Pacific Railway Company. This decision is contrary to the uniform holding as evinced in frequent prior decisions of the department, and it was likewise reviewed and *vacated* in 25 L. D. 351.

In *Aldritt vs. Northern Pacific R. R. Co.*, 25 L. D. 349, it was held by the Secretary of the Interior that "land chiefly valuable for its deposit of fire clay is included in the exception of mineral lands from

the grant to the Northern Pacific Railroad Company."

In *Florida Central & Peninsula Railroad Company*, 26 L. D. 600, Secretary Bliss holds that the act granting lands to the railroad company "does not in express terms include mineral lands, nor are such lands expressly excluded therefrom, but in view of the uniform and settled policy of the government to reserve such lands from grants to states or corporations for any purpose, it is held that all such lands, whether valuable for phosphate or other mineral deposits, are excepted from the operation of said grant."

It was again held, in 27 L. D. 91, that under Section 2325 R. S. an application for a mineral patent may embrace "any land claimed and located for valuable deposits," etc.

In the case of *Richter vs. State of Utah*, 27 L. D. 95, it is held that guano is a mineral and lands valuable for deposits of guano are mineral lands within the meaning of the laws of the United States, and excepted from grants to states.

The case of *Swank vs. California*, 27 L. D. 411, involved the right of California to select certain lands as indemnity school lands under its grant by the act of March 3, 1853, and it was held that prior to the approval of a school indemnity selection, land in-

cluded therein, if mineral in character, is open to exploration and purchase under the mining laws.

In 28 L. D., 348, it was held that "under the public land laws of the United States, lands valuable for mineral deposits can be disposed of only under the mining laws."

In 29 L. D., 181, Secretary Hitchcock held lands chiefly valuable for the gypsum and petroleum contained therein are not subject to school land indemnity selection.

In *Tulare Oil Co. vs. S. P. R. R. Co.*, 29 L. D. 269, Secretary Hitchcock held that lands chiefly valuable for their deposits of asphaltum are not subject to selection as indemnity under the railroad grant from which mineral lands are specifically excepted.

In *Schrimpf et al. vs. N. P. Ry. Co.*, 29 L. D. 327, the Secretary of the Interior held that "marble and slate are mineral substances and as such their existence on land in quantity and quality sufficient to render the land more valuable on that account than for agricultural purposes, makes such land mineral land within the meaning of the mineral laws, and within the meaning of the excepting clause in the grant to the Northern Pacific Railroad Company."

In 29 L. D., 456, gilsonite, asphaltum, elaterite, albertite, and like substances are held to be minerals.

But we think Congress itself has expressly declared its interpretation of the term "mineral lands" as used in the Act to be in accordance with the foregoing contentions. We refer to "An act to provide for the exemption and classification of certain mineral lands in the States of Montana and Idaho," approved February 26, 1895. As will be seen by the title the act relates to mineral lands.

Sec. 1 provides that all lands shall be examined and classified with *special reference* to the *mineral* and *non-mineral* character of such lands, and that the land officers shall reject, cancel and disallow any and all claims or filings "heretofore made or which hereafter may be made by the Northern Pacific Railway Company, which may be classified as *mineral lands.*"

Sec. 3 provides that:

"All lands shall be classified as mineral which by reason of valuable mineral deposits are open to exploration, occupation, and purchase (mark the words 'open to exploration,' etc.) under the mining laws; and that the Commissioners in making classification shall take into consideration the mineral discovered or developed on or adjacent to such land, and the *geological formation* of all lands to be examined and classified, or the land adjacent thereto, and the reasonable probability of such land containing valuable mineral deposits because of its said formation, etc. *Provided,* that the word 'mineral' shall not be held to include iron or coal." (Italics in above quotation our own.)

April 13, 1895, the Secretary of the Interior issued his instructions to the Commissioners wherein in instructing them how to arrive at the character of lands, he quotes the above language from Sec. 3 (20 L. D. 350).

This act has been construed by the Land Department in the case of *Beaudette vs. N. P. R. R. Co.*, 29 L. D. 248. In that case the Commissioners, under the Act of 1895 classed certain lands as non-mineral; Beaudette filed a protest against the acceptance of the classification, alleging that the land "contains a valuable deposit of sandstone suitable for building purposes, and that it is unfit for agricultural purposes." Upon hearing wherein the Northern Pacific Railroad Company was represented by its attorney, and defended the classification, the non-mineral classification was set aside, and upon appeal by the Railroad Company to the Secretary of the Interior, that officer used the following language:

"It appearing that the land in controversy is of vastly more value on account of the sandstone it contains, than for agricultural purposes, it results that the classification thereof made by the Commissioners is wrong, and that the land, although part of an odd numbered section within the primary limits of the grant to the Northern Pacific Railroad Company, did not pass under such grant and that said classification cannot be upheld, nor the contention of said company that it is not mineral land within the meaning of the excepting clause of said grant, be sustained."

Morrill vs. N. P. R. R. Co., 30 L. D. 475, is another decision by Secretary Hitchcock under this classification Act of 1895. The lands were classified as non-mineral in character by the Board of Commissioners. Morrill filed a protest alleging the existence of "A large deposit of limestone thereon valuable for fluxing purposes and also for building purposes." The learned Secretary states the question involved to be:

> "Whether the lands in controversy are shown to contain valuable mineral deposits such as render them open to exploration, occupation and purchase under the provisions of the United States mining laws."

After an extensive examination of the whole subject and a review of a number of former decisions of the department, the Secretary held that such lands were "valuable mineral deposits," and "open to exploration and purchase" under Section 2319 R. S., and consequently were within the exception in the grant to the railroad company excluding mineral land.

Our views as to this Congressional interpretation are expressed, much more clearly than we can express them, in the opinion of the learned District Judge Hanford, who tried this cause, which is set forth in the records, pages 33 to 36, and to which we respectfully refer.

Counsel further call attention to the fact that Section 2 of the granting act gives to the company the

right to take stone from adjacent lands. Why, we ask, did Congress give this right specially if it was not in the exception? Why would Congress do such a needless, idle thing?

Counsel further call attention to the Sundry Civil Expense Bill of July, 1898, 30 Stat. 597-620, and claim such is an interpretation of Congress that stone is not within the mineral exception in the grant. This statute provides that where, prior to January 1, 1898, any portion of the odd numbered sections is claimed in good faith by any settler who refuses to transfer his entry to some other lands, the company, upon a proper relinquishment thereof, shall be entitled to select in lieu of said land relinquished, an equal quantity of public lands "not mineral or reserved, and not valuable for stone, iron or coal." Counsel relies upon a proviso wherein it is declared that the company shall not be bound to relinquish lands which it uses and needs for railroad purposes, or lands valuable for stone, iron or coal. Counsel will not claim that they are bound to relinquish the lands in any event, no matter what their character, for certainly if the lands became the property of the company in March, 1884, the mere fact that some settler during the succeeding fourteen years settled thereon would not give Congress the right arbitrarily to declare that the company shall, by reason of this fact, relinquish its lands and choose other lands. This would certainly be taking property without due process of law. The act

simply gives the company the right to select lieu lands in case they do relinquish. The history of the decisions in the land department between the railroad and settlers shows that a great deal of trouble and of controversy have arisen between the settlers on the one hand and the company on the other, principally over the indemnity selections by the company. It appears to have been with this understanding that the provisions in question were inserted by Congress in the Sundry Civil appropriation bill. The land department and the Secretary of the Interior have construed this act, and in the regulations under the act to facilitate the adjustment by the Land Department of such conflicting claims shown in 28 L. D., 103, the Commissioner says the act designates a class of beneficiaries whose status is that of claimants adverse to that of the railroad company. It applies entirely to contests between settlers and the company and only to claims arising upon settlement, entry or purchase remaining unpatented at the date of the passage of the act, and not to claims arising upon rejected application or any other kind of a claim. (See 28 L. D., 124-126; 29 L. D., 224, 242); and the act is subsequently referred to by Congress in Act of March 2, 1901, as a "plan for the adjustment by the land department of conflicting claims, etc." Now, conflicting claims to lands excepted from the grant to the Northern Pacific Railroad Company have been held by the Land Department not to be subject to adjust-

ment under the provisions of this act. (See 30 L. D., 602.) It can in no sense be interpreted as an expression by Congress of the intention that stone lands passed to the railroad under its original grant. It must be assumed that the Land Department understood the purpose of the act; and in the regulations heretofore referred to the Secretary says:

"The purpose of the act is to avoid further strife and contention before the Land Department between the railroad company and individual claimants, and to that end extends alternatively to the individual and the railroad an opportunity to acquire lands of equal area in lieu of those in contest. The privilege of making the lieu selection is not dependent upon success or failure in the contest, but rather upon the existence of a contest or controversy which is intended to be disposed of without subjecting the parties to the delay, expense and inconvenience incident to its further prosecution. * * * A claim which will support a relinquishment and lieu selection is not described as a *lawful* one, but as a right— * * *claim.*" etc.

Now, as further evidence of the understanding of the Land Department that it was not a recognition of the right of the company to hold the stone lands, the Secretary in these instructions further informs the various local officers that where it satisfactorily appears from the record in any contest that the lands in controversy are valuable for stone, coal or iron, and consequently such as the railroad company is not bound to relinquish, he shall notify the individual who has the option of such fact, and unless the individual

himself elects to relinquish the same and take other lands "the contest will proceed to final determination without further regard to said act."

Now, why will the contest proceed if the railroad company is to have the lands upon a showing that they are stone lands? It is the purpose that if neither party will relinquish they shall fight it out and settle it by the law; but this same question has been raised before the Interior Department, in the case of *Schrimpf et al. vs. N. P. R. R. Co.*, 29 L. D., 327, involving lands in the State of Washington, shown to be more valuable on account of the marble and slate they contained than for agricultural purposes; and the question came up on the protest of Schrimpf against the patenting of the same to the Northern Pacific Railroad Company, because of the alleged mineral character. In this case the railroad claimed that they were not exempt from the claim of the Company, because Congress by this Act of July 1, 1898, definitely "recognized them as being within said grant." The Secretary, after a hearing on the question, says:

"It does not appear how this act can affect the question presented in this case, nor why it is cited, unless to show that Congress was of opinion that 'stone' lands are not embraced in the term of 'mineral lands.' The conclusion that such views were entertained by Congress does not necessarily follow from the language used in said act, nor does it follow that the word 'stone' would necessarily include marble or slate; but however this may be, the department is of

opinion that lands more valuable for their deposits of marble or slate than for agricultural purposes were by the granting act of 1864 excepted from the grant as mineral lands."

Having thus reviewed the question in such light as can be gained from an examination of the history of the Acts of Congress prior to the first mining law, and of the holdings of the Land Department, we will now examine some of the leading authorities of the various courts of the country upon the same subject.

Barringer & Adams in their recent work on the "Law of Mines and Mining in the United States," page 131, lay down the rule that though a particular mineral may not be mentioned or known to exist at the time of the grant, yet if it is fairly included in the general terms used, it will be excluded.

In *Gibson vs. Tyson*, 5 Watts, 35, the question was whether *chromate of iron* was included in the reservation of the grant reserving "all minerals," and it was held that it was.

In *Hartwell vs. Cammon*, 10 N. J. Eq. 128, the question arose upon the construction of the term of a conveyance granting "all mines, minerals, opened or to be opened." An article known as *paintstone* was claimed on the alleged ground that it was valuable for its mineral properties, and that it could be converted into a merchantable article adapted to the mechanical and ornamental arts, and was a mineral within

the definition given to that term by men of science. The Supreme Court of New Jersey say:

"I do not think the term should be confined to the metals, or metallic ores. I cannot doubt if a stratum of salt, or even a bed of coal, had been found, they would have passed under the grant."

In *Funk vs. Haldeman*, 53 Pa. St. 229, the Supreme court of Pennsylvania held that petroleum oil was a mineral.

Under a statute of Pennsylvania passed April 25th, 1850, it was provided that a suit might be brought by a tenant in common of "minerals." *Thompson vs. Noble* was a suit of this character brought by a tenant in common against his co-tenant to recover certain petroleum.

The Court of Common Pleas held:

"The petroleum was a mineral, *and the fact that it was unknown as a product from land at the time* the act was passed did not prevent its application." (Italics our own.)

Another statute authorized the mortgaging of a leasehold of mining land. Subsequent to the passage of the act, certain lands were discovered to contain oil, and they were mortgaged as mining land. The question, therefore, arose in *Gill vs. Weston*, 110 Pa. St. 316, whether or not these oil lands were mining lands, and if so, whether or not, being unknown to be

such at the passing of the act, they were included. The Court held that:

"Petroleum was a mineral substance obtained from the earth by process of mining, and lands from which it is obtained may, with propriety, be called mining lands, and that the Act applied to and authorized a mortgage of the leasehold of oil lands, although the Act was passed *before petroleum was discovered.*"

Judge Ross of the U. S. Circuit Court, in *Gird vs. Cal. Oil Co.,* 60 Fed. 531, decided as follows:

"The premises in controversy are oil-bearing lands, the government title to which, under existing laws, can alone be acquired pursuant to the provisions of the mining laws."

An instrument of lease executed in 1796 leased a tract of public lands "together with the mines or minerals of whatever description." There were no opened mines or quarries on the premises or known to exist thereon at the date of the lease. A stone quarry was discovered in 1855 (61 years later), and the question whether or not stone was included in the word "minerals" as used in the lease, came before the Supreme Court in *Griffin vs. Fellows,* 8 Mor. Min. Rep. 657, which held that:

"The term 'minerals' embraces everything not of the mere surface, which is used for agricultural purposes; that the granite of the mountains, as well as metallic ores and fossils, are comprehended within it."

In a late case of *W. & C. Nat. Gas Co. vs. Dewitt,* 130 Pa. 235, the Supreme Court of Pennsylvania held

that "natural gas is included within the meaning of the word 'mineral.'" The same holding was made in *State vs. I. & B. O. O. G. & N. Co.*, 2 Inter. St. Com. Rep. 758; and the Circuit Court of the United States for the Northern District of New York In Re *Buffalo Nat. Gas & Fuel Co.*, 73 Fed. 191, decided that natural gas when brought into this country from Canada through pipes, was exempt from duty as "crude mineral."

In *Armstrong vs. Lake Champlain Granite Co.*, 32 N. E. 186 (147 N. Y. 95), the grantor had conveyed to the grantee all the "mineral and ores in the tract of land." Plaintiff was the owner of whatever passed by the conveyance of "minerals and ores." The defendant was owner of what remained of the tract. Subsequent to the conveyance of the "minerals and ores," granite was discovered on the premises, and the defendant began to quarry it; plaintiff claiming that it was included in his purchase of the "minerals and ores," brought an action. The Supreme Court of New York held:

"That the words 'minerals and ores' standing alone would include granite; that it was an unwarrantable limitation to exclude from the operation of the grant beds of coal or other non-metallic mineral deposits of commercial value, or to confine it to such minerals as were known or supposed to be on the premises at the time."

And see further as to what are mineral lands.

Lindley on Mines and Mining, Secs. 94 and 95;

Ah Yew vs. Choate, 24 Cal. 562;

Davis vs. Wiebole, 139 U. S. 507.

Freezer vs. Sweeney, 21 Pac. 20, was an action brought to determine the right of possession to a mining claim. The defendant claimed under a location of 1886 as a "placer mining or stone quarry claim." Plaintiff claimed under a location made a year later as a "placer claim." The Supreme Court of Montana held:

"That Sec. 2329 of the Revised Statutes (which is part of the act of 1872) enlarges the signification commonly given to 'placer claims' and makes such locations include all forms of deposit excepting quartz claims or rock in place."

"It is not presumable that the government of the United States intended to deprive its citizens of the use of, or means of acquiring title to, something so necessary and indispensable as rock or stone is for building purposes; and, if the land in which rock or stone-quarries are found cannot be taken up under the provisions of the section mentioned, no provision of the land laws is known under which title to such deposits can be acquired, when they are found outside of lands valuable for minerals (strictly speaking), or outside of agricultural lands, title to which can be acquired under the pre-emption and homestead laws."

On this same subject we cite the opinion of the Circuit Court and Circuit Court of Appeals contained in the transcript herein.

In *Johnson vs. Harrington,* 5 Wash. 78, the Supreme Court of Washington uses the following language:

"That stone is a mineral will hardly be disputed. See Copp's Mining Laws (2d Ed.), page 510. It has been recognized as such by the duly authorized department of the government, and entries of land containing valuable deposits of building stone or limestone are permitted as 'placer claims,' under Sec. 2319 and 2329 of the Revised Statutes of the United States, which relate to the entry and patent of mining claims."

In *Ford vs. Gracey,* 94 U. S. 762, Justice Miller recognizes the existence of "ore or other mineral product" in mines.

We are not unmindful that the Supreme Court of Washington, in *Wheeler vs. Smith,* 5 Wash. 704, seemed to forget its previous ruling and held that the term "mineral" was intended to embrace only deposits of *ore,* and excluded the idea of non-mineralized deposit. This decision stands alone in American jurisprudence. Mr. Lindley severely criticises it in his work in Sec. 96, as follows:

"The Supreme Court of the State of Washington in the case of *Wheeler vs. Smith* seeks to limit the meaning of the term "mineral," as used in the Con-

gressional Mining Laws to *metallic substances.* In doing so the Court treats the ruling of the Land Department as possessing no force or virtue, and refuses to adopt the reasoning and conclusions reached in a parallel case by the Supreme Court of Montana (*Freezer vs. Sweeney*), a Court noted for its experience and ability in dealing specially with mining questions and controversies arising out of the mining laws. This decision of the Supreme Court of Washington also conflicts with a number of carefully considered American cases, which will be noted when we come to enumerate the various substances which have been held to be within the reasonable definition of the term mineral."

And again in Sec. 323, on page 425, he gave our Supreme Court a parting shot by again referring to it as "an offending state Court which announced the doctrine that a mineral deposit could not be patented under the mineral law unless it contained some of the *metals.*"

Hoke Smith severely criticises the same Court for invading his jurisdiction in the same case. Secretary Bliss in *Pac. Marble Co. vs. N. P.* (*supra*) also criticises it. A careful examination of the case justifies us in making the following criticisms:

(1) It is contrary to authority and is not binding.

(2) The decision of the question was unnecessary.

In *Cohens vs. The State,* 6 Wheat. 264, C. J. Marshall said:

"It is a maxim not to be disregarded, that general expressions in every opinion are to be taken in

connection with the case in which they are used, and do not control the judgment in a subsequent case involving the precise point, etc."

Again, *Carroll vs. Carroll*, 16 How. 275, holds that Courts are not bound by any part of an opinion in any case not needful to the ascertainment of the right of a question between the parties.

In *Broder vs. N. W. & M. Co.*, 101 U. S. 274, it was held grants to the Pacific railroads were not intended to curtail the right of miners to make locations.

Lindley, in Sec. 152, uses the following language:

"When these railroad acts became laws, the policy of the government of reserving the mines and mineral lands for the use of the United States was fixed; and if there had been no special clauses of reservation in the acts, the courts would have been forced to the conclusion that such lands were reserved by implication from the donations to railroads, following the doctrine announced with reference to grants of sixteenth and thirty-sixth sections to the states for school purposes."

From the formation of the government until the first mining law of 1866, the settled policy of the United States was not to part with the ownership of the mineral lands. From every grant they were reserved, so that the courts take the view that from this policy an intention to do so was implied in all cases.

Barringer & Adams, *supra*, 194;
Morton vs. Nebraska, 21 Wall. 660.

This court has heretofore reviewed the very statutes cited by the counsel in this case and has laid down the rule that these statutes evidence the policy of Congress to exempt all mineral substances from railroad grants.

Barden vs. N. P. R. R. Co., 154 U. S., pp. 317, 318.

Concerning the citations of the counsel from the courts, we have heretofore said that those from California, Nevada and United States were not applicable. Counsel quotes from Justice Miller in his instruction in *Stevens vs. Williams*, 1 McCrary. In this instruction that learned jurist recognized the distinction between *ore*, strictly speaking, and mineral. All ore is mineral, though all mineral may not be ore.

The citation from 101 Pa. St. does not strengthen counsel's contention, for it holds that petroleum is a mineral, and contrary to learned counsel's contention in the case at bar, it distinctly holds also that "anything dug from mines or quarries" is mineral.

In view of the above we apprehend that it will be conceded by complainant that there was reserved from the grant the rights of miners to make exploration and discovery for mineral, but they narrow the construction to be put on minerals by limiting the word "mineral" to some of the precious metals, and this brings us to the discussion of our second proposition, viz:

II.

That independent of the question whether stone was understood to be a mineral at the time of the passage of the act, Congress has so extended the mining law as to make minerals include stone, and has otherwise reserved and appropriated stone lands, and consequently at the date when the railroad became entitled to select these lands, they were otherwise reserved or appropriated, and were not free from other claims or rights, but were mineral lands within the meaning of the laws at that date, and subject to other claims or rights.

There can be no doubt of the power of Congress to do this, and especially when the grant was made subject to the reserved power of Congress to add to, alter, or amend the Act.

Menotti vs. Dillon, 167 U. S. 703;
N. P. R. R. Co. vs. Sanders, 166 U. S. 620;
Lindley on Mines and Mining, Sec. 158.

The Land Department have been adhering to this same doctrine. In 20 L. D. 332 it was held by that Department that the withdrawal on the general route for the benefit of the Northern Pacific grant was no bar to the subsequent establishment of an intended reservation within the limits of such withdrawal. This is affirmed in 26 L. D., 422.

Secretary Bliss, in the case of the N. P. R. R. Co., 27 L. D., 505, further held that a reservation for any

purpose, within the limits of the withdrawal, made prior to the definite location of the line of the railroad and existing at such time, excepts the land covered thereby from the operation of the grant.

See, also, *N. P. R. R. Co. v. Martin*, 6 L. D. 657.

In *Ivanhoe Mining Co. vs. Keystone Mining Co.*, 102 U. S. 167, this Court furnishes a most interesting review of the policy of the United States to preserve all mineral lands from sale and for its own use, and of the reasons which finally resulted in the government abandoning such policy and enacting the mining laws. This decision shows that it was the policy of the government from the beginning to secure to itself a fair proportion of the minerals and the control of the same. That while Congress delayed and hesitated to act in framing a policy for its own use, the discovery of gold in California, with the consequent swarm of enterprising and industrious citizens filling that country and dealing in claims almost as current as currency, forced the matter upon the attention of Congress. And still so anxious was Congress to persevere in the policy of reserving all mineral lands that it held the matter in abeyance until 1866.

"During the period from 1849 to 1866 the system of the disposition of the public lands, in general, had to be introduced into California, and grants of land were made to the State for various purposes, also to railroad companies; and in all this the attention of Congress was, necessarily, turned to the distinction

between mineral lands and the ordinary agricultural lands of the other western states to which similar laws applied. * * * And so careful was Congress to protect mineral land from sale and from pre-emption that, * * * the surveyors were forbidden to extend their surveys over mineral lands."

This appears to us to be a ruling in favor of the position that these Congressional grants were only of agricultural lands, strictly speaking; and further, if Congress was so careful to protect mineral land from sale as to forbid the surveyors to survey the mineral lands, how can counsel by any reasonable construction infer that land containing mineral substances so useful and valuable as stone, the lines of which could not be surveyed, was nevertheless not mineral lands.

See, further, Barringer & Adams, *supra*, p. 196.

But Congress finally enacted the first mining law of July 26, 1866 (14 Stat. 251). Section 1 of this first mining law, passed July 1, 1866 (14 Stat. 251) declares:

"That the mineral lands of the public domain, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and occupation by all citizens of the United States."

Our contention is further strengthened by the tracing of the evolution in this respect running through the several acts for the disposal of mineral lands.

As we said before, under the appropriation made yearly by Congress exploration and discovery had been going on, and this first mining law, which consisted of eleven sections, was, four years later (16 St., p. 217), amended by the addition of six sections numbered from 12 to 17 inclusive, which sections it was declared "shall hereafter constitute and form a part of the aforesaid act." The first section of the amendment enacts "that claims, usually called 'placers,' including *all forms of deposit*, excepting veins of quartz or other rock in place, shall be subject to entry and patent under like circumstances and conditions as are provided for veins or lode claims."

This act, together with the act of May 10, 1872, hereafter referred to, so far as they are unrepealed, have been consolidated and now constitute Chap. 6, Title XXXII. of the Revised Statutes, and with the acts supplementary thereto, now cover exclusively the granting of mineral lands by the United States.

Gelcich vs. Moriarity, 53 Cal. 217;
Barringer & Adams, supra, page 196.

In all cases lands valuable for minerals or containing valuable mineral deposits shall be reserved from the sale except as otherwise expressly directed by law. (R. S. 2318, 2319). Hence, assuming for the sake of argument, that it was the intention of Congress that lands valuable for stone were not included in the exception of mineral lands in the grant to the

Northern Pacific Railroad Company this court has held, as we have heretofore seen, that it was nevertheless competent for Congress at any time thereafter, prior to the definite location of the road, to make such reservations or to reserve from said grant such lands as Congress might choose; and therefore, if Congress saw fit to reserve from time to time, as it has done, agricultural lands for purposes of reservation, it certainly could reserve lands valuable for stone; and if this reservation was made prior to the definite location of the road, such lands were not, at the date of such definite location, unreserved or unappropriated or free from other claims, because they were by reason of such reservation open and subject to exploration, occupation and purchase. Such lands now can only be taken under the mineral laws, with the exception of mineral lands in the states of Michigan, Wisconsin and Minnesota (R. S. 2345), Kansas and Missouri (19 Stat. 52), Alabama (22 Stat. 487), in which states mineral lands can be taken as agricultural lands.

Now the complainant concedes that this granite is not a vein or lode claim, nor is it rock in place, and also concedes that it is a "form of deposit;" but contends that it is not such a "form of deposit" as is included in the word "placers." The act, bear in mind, is to broaden the meaning of placers as theretofore understood. It says that claims usually called placers, and which theretofore might have been interpreted to mean only claims having gold dust in the sand,

shall include all *forms of deposit*, excepting veins of quartz, or other rock in place, so that it makes no difference whether the form of deposit contains any of the precious metals or not. If it is a deposit of any substance belonging to the mineral kingdom, and more valuable for that particular substance than for agriculture then it is mineral land, and if it is not a vein of quartz or other rock in place, then it is a placer.

Speaking on this subject, Mr. Lindley in Sec. 419, says:

"We say that all forms of deposit, other than those occurring in veins of rock in place, must be appropriated under the laws applicable to *placers*, for the reason that *placers* present, in popular estimation, the highest type of deposits which do not occur in veins of rock in place, and are the only class of such deposits as are individualized and specially named in the statute."

After thus laying down the rule Lindley takes up the theory so often advanced that claims usually called "placers" were granted for the first time by the mining act of July 9th, 1870, concerning which he says as follows:

"This has always been familiarly called the 'placer law' in contradistinction to the 'lode law' of July 26th, 1866. The subsequent legislation preserved the distinction, so that, colloquially speaking, mineral deposits are to be treated either as lodes or placers. In time, *placer*, which was the name given by the Spaniards to the auriferous gravels of America, has become a generic term, in which all forms of deposit,

other than those occurring in veins, are popularly included."

But Congress kept up its appropriations and the government kept up its exploration and discovery of these vast mineral regions, and with the advance of time, and the increase of the mining industry, and of the knowledge of the mineral resources of the country, Congress apparently seeming to apprehend the arising of just such a question as complainant raises here, in order to set at rest forever the question, passed on May 10th, 1872 (17 St., p. 91), an act entitled "An act to promote the development of the mining resources of the United States." Sec. 1 reads as follows:

"All *valuable mineral deposits* in land belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, etc."

This court in *Deffeback vs. Hawke,* 115 U. S. 392, recognizes the criterion to be the value.

See, also, *Davis vs. Weibold,* 139 U. S. 507.

Now we notice the evolution. The first act in 1866 declares the mineral lands to be free and open to exploration and occupation. The amendment of 1870 provides that placers shall include "all forms of deposits," and the act of 1872 still further broadens it by using the words "all valuable mineral deposits."

The test of the character of railroad lands is the same as applied to the question between mineral and agricultural claims, viz: are they more valuable for mineral than for agricultural purposes?

See *Ivanhoe Mining Co. vs. Keystone Mining Co., Supra.*

Barringer & Adams, supra, 533, Note 2;
Barden vs. N. P. R. R. Co., 154 U. S. 288.

The Land Department, in accordance with these decisions, holds:

"The burden of proof is upon the railroad company to show the agricultural character of land that is returned as mineral by the Surveyor General."

C. P. R. R. Co., 13 L. D. 603.

Now is land valuable for its large stratas of fine granite, although there be no precious metals in it, a valuable mineral deposit? If so, then it was declared to be free and open to exploration and purchase twelve years before the definite location of the complainant's road. Sec. 6 of the act of 1872 provides for the obtaining of patents for land "claimed and located for valuable deposits." It does not say for gold, silver or other precious metals but for lands valuable for deposits, and prescribes a form of proceeding to obtain patents for lands containing valuable deposits.

But after further exploration and the increased knowledge of the mineral resources, Congress discov-

ered that large areas of land existed in Washington, Oregon, California and Nevada, some of which were chiefly valuable for their timber, some for stone, but all unfit for cultivation. It did not necessarily follow that it was building stone of an extra class but that it was more valuable for stone than for anything else, and in any event they were *unfit for cultivation.* And hence, if there ever was a doubt upon the foregoing statutes, Congress set the matter at rest by the Act of 1878 (20 Stat., p. 89), which provided for the entry and patenting of lands in the states above named chiefly valuable for their timber or stone, but *unfit for cultivation.* This was six years before the definite location of the complainant's road and it was certainly a reservation by Congress from the operation of that grant of lands in the four states mentioned valuable chiefly for timber or for stone, but *unfit for cultivation;* and hence, if there is within the limits of this grant any land *unfit for cultivation* which at the same time is chiefly valuable for timber or chiefly valuable for stone (laying aside the question of its quality as building stone or otherwise) it was reserved from the grant to the railroad company. The act of 1878 does not refer exclusively to so fine an article as building stone, but if the stone upon it is valuable for any commercial purpose, if such is its chief value and if it is unfit for cultivation, it was purchaseable under the timber and stone act of 1878.

This argument is further strengthened by consideration of the act of 1892, under which lands valuable for building stone are enterable under the placer laws. This act did not repeal the Act of 1878, but the second section of the Act of 1892 extended the Act of 1878, which by its enactment applied only to the states of Washington, Oregon, California and Nevada, to all the public land states. We have seen that lands valuable for building stone were enterable under the placer laws of 1889 prior to the passage of this act, and this act of 1892 appears to have been a Congressional disapproval of the decision heretofore mentioned of the Land Department (subsequently vacated, however), that lands valuable for building stone could not be entered under the placer act. While no kind of stone except lands valuable for building stone may be taken under the act of 1892, yet all kinds of stone, including building stone where such is the chief value of the land, could be taken under the act of 1878. It has been held, in 23 L. D. 322, a decision subsequent to the act of 1892, that:

"There can be no doubt but what land chiefly valuable for building stone could have been purchased under the Act of 1878."

Now, lands valuable for building stone can be taken either under the Act of 1878 or 1892, but if taken under the former act the applicant stands as an applicant under the Timber and Stone Act, whereas if applied for under the Act of 1892, the applicant has

all the rights of an applicant under the mineral laws, and consequently, as between two claimants under the separate acts, the mineral claimant would have superior rights. This is shown by the case of *Forsythe vs. Weingart,* 27 L. D. 680. The facts were these: Weingart, on February 19, 1896, made application under the act of 1878 to purchase certain stone lands, and made his proof. Forsythe et al., protested, alleging prior location under the placer mining laws. The local Land Office recommended acceptance of Weingart's proof under the Act of 1878, and the dismissal of Forsythe's protest. Upon appeal by the protestants, the General Land Office reversed the Local Land Office, whereupon Weingart appealed to the Interior Department. The Acting Commissioner states as follows:

"The land in question is of the character of lands which may be disposed of either under the Act of 1878 or under the placer minings laws."

He then states the proposition involved as follows:

"Weingart having applied to purchase it under the Timber and Stone Act, and Forsythe, et al., having alleged its location as a placer mining claim, the question of priority of right is presented which involves the necessity of determining whether in fact protestants have a placer mining location which embraces the land in dispute."

The Interior Department awarded the land to the claimant under the mineral laws.

Each of the acts of 1866, 1870, 1872 and 1878 was a legislative interpretation, which for all future purposes classified lands containing valuable deposits of building stone as mineral land. But it is claimed that these acts cannot have the effect of interpreting the word "mineral" as used in the Act of 1864; that the word there used must be more restricted. If a restricted meaning is to be applied, it must be by reason of the relative position of the parties, or the substance of the transaction. In considering this relative situation of the parties, and the substance of the transaction, to what point of time must we direct our attention in dealing with land grants and rights asserted under them? To the date of the passage of the act making the grant, or the time when the grantee becomes first entitled to assert a claim to a particular tract of land? Fortunately this question has been settled by the Supreme Court of the United States in the case of *Mullan vs. United States*, 118 U. S. 271. The facts in that case were these:

By the Act of March 3, 1853, the State of California was authorized to select lieu lands, or lands in lieu of such portions of the 16 and 36 sections as were theretofore lost to the state. In 1868, Mullan applied to the State Surveyor-General of California to purchase a half section of land. His application was favorably considered; in due process of time the Secretary of the Interior listed the land to the state and

Mullan received a state patent. At the time Mullan instituted the proceedings the land was notoriously coal land. This fact being brought to the attention of the government, a suit was instituted by the government to vacate the listing. It was claimed by Mullan that under the pre-emption act of 1841, the word "mines" did not include coal lands, and consequently such lands were not considered as mineral lands at the date of the lieu land act of 1853. Subsequently, however, Congress by the Act of July 1st, 1864, as we have seen, gave the legislative construction to the term which thenceforth attached to known coal beds or coal fields, and the question was whether the date of consideration of the character of the land should be the date of the passage of the law of 1853 or the date of the application for the patent. Judge Sawyer held the date to be the date of the application for the patent. The case was appealed to the Supreme Court of the United States, which affirmed this decision, summing up these views as follows:

"At the time the selection was actually made therefor, it cannot be doubted that the land was mineral land, both in law and in fact, * * * and we agree with the Circuit Court in the opinion that the *rights of the parties are to be determined by the law as it stood then.*" (Italics our own.)

Lindley in Sec. 140 says:

"The enactment of the general mining laws by Congress incorporated into the land system a new

element, announced new principles and a new policy, in the light of which all pre-existing land-grant laws to the extent that they remain unsatisfied are to be administered."

And Lindley in Sec. 154 reviews the proposition that grants of particular sections of land to the railroad company is a float, and acquires precision at the date of the definite location of the line, concerning which he says:

"While this is true as to such lands as are within the purview of the grant, it is not to be inferred that the mineral or non-mineral character of the land is to be determined as of the date of either the survey or filing the map of definite location."

And again in Sec. 159 he says:

"The question whether a given tract of land within the primary, or place, limits of a railroad grant is mineral, and therefore excepted out of the grant, is to be determined according to the state of the law and the facts as they exist at the time the railroad company applies for its patent."

In the *N. P. R. R. vs. Sanders*, 49 Fed. 134, the Circuit Court of Appeals used the following language:

"Much less can there be any authority or jurisdiction for construing a grant by narrowing a reservation made therein for the benefit of the people in general, by ascribing to it a meaning different from anything which its words express. Although there was no statute providing for the sale or bestowal of mineral lands at the time of the grant to plaintiff,

Congress had the right to and did afterwards make such a law, and under it claims could be and were lawfully initiated prior to the definite fixing of the line of plaintiff's road. We think that the reservations in the paintiff's grant were made in contemplation of future legislation as well as the then existing laws."

In the case of *N. P. R. R. vs. Hinchman*, 53 Fed. 526, it was held that after the withdrawal, but before definite location, where Congress passed an act providing for the disposition of a large area within the withdrawal for certain purposes, that Congress had the power to do so, and that this was an otherwise appropriating of the lands, prior to, and at the time of definite location, and that "in the very grant to the N. P. R. R. the right was reserved to the government to reserve, sell, grant or otherwise appropriate any of the lands which might fall within the limits of the same up to the time of definite location."

"The privilege of exploring for mineral lands was in full force at the time of the location of the definite line of the road, and was a right reserved and excepted out of the grant at that time. * * * The grant under consideration is one of a public nature. It covers an immense domain, greater in extent than the area of some of our largest states, and it must be strictly construed."

Barden vs. N. P. R. R. Co., 154 U. S. 288.

In N. P. R. R. vs. Cannon, 54 Fed. 252; *N. P. R. R. vs. Barden*, 154 U. S. 330, it was held that the inquiry is directed to the present character of the

land, not to its character as of the date of the railroad grant.

These authorities are simply following the rule giving weight to the interpretation placed upon the law by the land department. That department has consistently adhered to this ruling, as will appear from the following:

"Land in reservation at the date of definite location is excepted from the terms of the grant."

A. & P. R. R. Co. vs. McCabe, 4 L. D. 94;
St. P. M. & M. Ry. Co. vs. N. P. R. R. Co., 5 L. D. 429;
S. P. R. R. Co. vs. Nimmo, 4 L. D. 100;
Sansome vs. S. P. R. R. Co., 4 L. D. 357;
Story vs. S. P. R. R. Co., 4 L. D. 397.

If this land was subject to entry under the mineral laws, existing at the date of definite location of the road, then it was not "free from other claims or rights," and it did not pass to the road.

Holmes vs. N. P. R. R., 5 L. D. 336;
McLean vs. N. P. R. R., 5 L. D. 529;
Burt vs. N. P. R. R., 3 L. D. 490;
N. P. R. R. vs. Dudden, 6 L. D. 6.

Lands reserved by the President after the grant, the reservation still being in force at date of definite location, are not "free from other claims," and are reserved, and do not pass to the road. This was a

case where lands were reserved by the President for an Indian reservation after the grant, but prior to the date of the definite location.

Jackson, Lansing & Saginaw R. R. Co., 5 L. D. 432.

The condition of the land at the date of definite location determines whether it will pass under the grant.

Cayce vs. St. L. & I. M. R. R., 6 L. D.

The status of the land at the date of the definite location of the road determines whether it will pass under the grant.

Nellson vs. N. P. R. R., 9 L. D. 402;
Showell vs. C. P. R. R., 10 L. D. 167.

The right of the United States to the land is determined by the conditon of the land at the date of the filing of the map of the definite location of the road.

Olney vs. H. & D. Ry. Co., 11 L. D. 188.

The Secretary of the Interior held in *Central Pacific R. R. vs. Valentine*, 11 L. D. 238, that the discovery of the mineral character of land at any time prior to the issuance of patent to the railroad, effectually excludes such land from the railroad grant, and said:

"All mineral lands other than coal and iron are expressly excepted from its operation."

It was held in *N. P. R. R. Co.*, 12 L. D. 572, that lands included within suspended homestead entries at the date of the definite location, is excepted from the operation of the grant. By analogy, all land of the character of the land in controversy in this case was in effect suspended from entry by the Act of 1878 if it was not considered mineral land prior to that date.

"Lands reserved for Indian reservations within the railroad limits subsequent to the granting act and prior to the date of definite location, are excluded from the grant."

A. P. N. R. R. vs. Tiernan, 17 L. D. 587;
A. P. N. R. R. vs. Willard, 17 L. D. 554.

Discovery of the mineral character of land at any time prior to the issuance of patent effectually excludes such land from the grant.

N. P. R. R. Co. vs. Champion, 14 L. D. 699.
N. P. R. R. Co., 13 L. D. 691.

Now, the stipulated facts in this case show that the line of definite location was not made until March, 1884; consequently, even admitting that "mineral lands" as used in the granting act, did not embrace lands of the character of these in controversy, it must be apparent from the foregoing decisions that the acts of 1866, 1870, 1872 and 1878, passed prior to this definite location, was a reservation or an otherwise

appropriation of these lands. Or if, as some of the foregoing authorities held, the condition of the land at the date of final survey or application for a patent is to govern, then in view of the fact that the land was not surveyed until within the past year, we think the act of Congress of 1892, providing for a patent of lands chiefly valuable for stone, can be considered as a lawful reservation or otherwise appropriation of these lands.

We conclude this branch of the discussion by the following quotation from Mr. Lindley, who, after an extensive review of the authorities, sums up the conclusion in Sec. 162 of his work as follows:

"We are authorized to deduce the following general conclusions from the foregoing exposition of the law:

"(1) That lands embraced within the primary, or place, limits of a railroad grant, whose mineral character is known or established at any time prior to the issuance of a patent are not patentable to the railroad company, and are excepted out of the grant.

"(2) Whether a given tract within either the primary or indemnity limits is mineral or not must be determined according to the state of the law and facts as they exist at the time patent is applied for or application to select is made. Until patent is issued or selections are finally approved, the Land Department retains jurisdiction to pass upon the character of the land; and its judgment, culminating in the issuance of a patent or final approval of a selection, is conclusive, and not open to collateral attack.

"(3) The term 'mineral land,' as used in the reservation clauses of railroad grants, includes all val-

uable deposits, metallic and non-metallic, which are or may be subject to entry under the mining laws, except coal and iron, where these substances are excepted out of the mineral reservations.

"(4) Mineral lands within either the primary or indemnity limits of railroad grants, prior to patent or certification, belong to the public domain, and are open to exploration and purchase under the mining laws, the same as any other public mineral lands."

III.

But we contend that, irrespective of all that has been said, the appellant has no standing in court, and cannot be heard to urge the invalidity of appellee's patent.

The stipulated facts in this case show that application for patent was made in due form, and due notice given, that the complaint made no appearance, objection or contest. We think, under the authorities, it now has no standing in this Court. It was held in *N. P. R. R. vs. Cannon*, 54 Fed. 257, as follows:

"Appellant was charged with knowledge of the notice which the mineral applicant was required to give by general publication and by the posting of notices upon the claim, and of the notices required to be given by the Land Department, and, having failed to file any contest against defendants' application, the question thereafter—as to the character of the land, whether mineral or not—became a matter between the defendants and the government of the United States. That question is one which required the exercise of judicial power and discretion upon the part of the of-

ficers of the Land Department, and their judgment thereon is not open to review in an action of the character made out by appellant's bill."

The patent has been issued in this case as mineral land. That is conclusive in this controversy, against the complainant, by the fact that no adverse claim was asserted by it to the appellee's application for a patent of the premises as such ground.

That question is not now open to litigation.

Dahl vs. Raunheim, 132 U. S. 263;
Eureka Mining Co. vs. Richmond Mining Co., 4 Sawyer, 302.
Hamilton vs. Mining Co., 33 Fed. 562.
Seymour vs. Fisher, 16 Colo. 188.
Barringer & Adams on the Laws of Mines and Mining in the United States, 382-388, 394, 416;
Gustavus vs. Hagland, 1 L. D. 591;
Wight vs. Tabor, 2 L. D. 738;
28 L. D. 322.

This proposition, it seems to us, has become elementary, and we will not prolong this discussion with further citations.

We ask that the judgment of the Lower Court be affirmed.

Respectfully submitted,

J. T. RONALD,

Solicitor for Appellee.

Supreme Court U. S.
FILED
DEC. 9 1902
JAMES H. McKENNEY
Clerk

No. 61.

Motion for Leave to intervene.

Filed Dec. 9, 1902.

In the Supreme Court of the United States.

OCTOBER TERM, 1902.

NORTHERN PACIFIC RAILWAY COMPANY, appellant,
v.
J. A. SODERBERG.

No. 61.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

MOTION ON BEHALF OF THE UNITED STATES FOR LEAVE TO INTERVENE.

In the Supreme Court of the United States.

OCTOBER TERM, 1902.

NORTHERN PACIFIC RAILWAY COMPANY, appellant, *v.* J. A. SODERBERG. } No. 61.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

MOTION ON BEHALF OF THE UNITED STATES FOR LEAVE TO INTERVENE.

The United States moves the court for leave to intervene in the above-entitled cause and to participate in argument therein, and in support of this motion respectfully shows unto the court that the controlling question of law presented in the case is the true interpretation of the word "*mineral*" in that portion of the Northern Pacific land grant (13 Stat., 365) whereby certain public lands "not mineral" are granted to the Northern Pacific Railroad Company, and wherein the following provision upon that subject occurs: "*Provided further*, That all mineral lands be, and the same are hereby, excluded from the operations of this act, and in lieu

thereof a like quantity of unoccupied and unappropriated agricultural lands, in odd-numbered sections, nearest to the line of said road may be selected as above provided: *And provided further*, That the word 'mineral,' when it occurs in this act, shall not be held to include iron or coal."

A large portion of the Northern Pacific land grant, viz, more than 1,000,000 acres, remains unsurveyed and a still larger portion remains unadjusted; that is, it is still undetermined as to whether specific sections are of the character and class of lands which pass under the grant or are excluded therefrom. The question, therefore, of what lands are excluded from the grant as being mineral in character is one in which the United States is directly concerned, in that it affects the quantity and character of lands which will remain to the United States to be disposed of under the mining laws within a strip 120 miles in width throughout the primary limits and first and second indemnity belts in North Dakota, Montana, Idaho, Washington, and Oregon; and in that it affects the land department in the administration and adjustment of this railroad land grant.

The particular substance, the character of which, whether mineral or nonmineral, is in controversy in this cause, is granite; but the principle by which it will be determined, whether granite of a good merchantable quality, giving controlling value to the land in which it is found, excludes such land from this land grant, is equally applicable to alum, asphaltum, borax,

marble, mica, carbonate and nitrate of soda, petroleum, graphite, etc.

The exception or exclusion of mineral lands found in this land grant is also found in the same or in similar language in the grants to the Union Pacific Railroad Company, the Central Pacific Railroad Company, the Southern Pacific Railroad Company, the Atlantic and Pacific Railroad Company, the Oregon and California Railroad Company, and to other railroad companies having similar land grants.

The question presented is therefore one of general public interest, in the solution of which the United States is necessarily greatly interested.

JOHN K. RICHARDS,
Solicitor-General.
WILLIS VAN DEVANTER,
Assistant Attorney-General.

DECEMBER 8, 1902.

Service of the foregoing motion is hereby waived.

C. W. BUNN,
Attorney for Appellant
R. A. BALLINGER,
Attorney for Appellee

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In the Supreme Court of the United States.

OCTOBER TERM, 1902.

NORTHERN PACIFIC RAILWAY COMPANY, appellant, *v.* J. A. SODERBERG, APPELLEE. } No. 61.

BRIEF ON BEHALF OF THE UNITED STATES.

The grant to the Northern Pacific Railroad Company, its successors and assigns (act of July 2, 1864, 13 Stat., 365), is of—

> every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from preemption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office; and whenever, prior to said

> time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or preempted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections.

The following provisos in the grant are pertinent to the question here presented:

> *Provided further*, That all mineral lands be, and the same are hereby, excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands, in odd numbered sections, nearest to the line of said road may be selected as above provided: *And provided further*, That the word "mineral," when it occurs in this act, shall not be held to include iron or coal.

By joint resolution, January 30, 1865 (13 Stat., 567), it was declared:

> That no act passed at the first session of the Thirty-eighth Congress, granting lands to States or corporations, to aid in the construction of roads or for other purposes, or to extend the time of grants heretofore made, shall be so construed as to embrace mineral lands, which in all cases shall be, and are, reserved exclusively to the United States, unless otherwise specially provided in the act or acts making the grant.

Under the pleadings and agreed statement of facts the controlling question of law presented for decision

is whether land principally valuable for deposits of granite of good merchantable quality contained therein is within the exception of "mineral lands" stated in the grant to the railroad company and in the joint resolution of January 30, 1865.

The exception or exclusion of mineral lands from this grant is the same or similar in language to exceptions from numerous other railroad land grants which are still pending before the land department for administration and adjustment. A large portion of the Northern Pacific grant remains unsurveyed and a still larger portion remains unadjusted. Whether specific sections are of the character and class of lands which pass under the grant, or are excluded therefrom by reason of the exception of "mineral lands" is, therefore, not only a question of general public interest, but one in which the Government has a direct pecuniary interest. In view of this condition, the United States has been permitted to intervene in this case and to participate in the argument.

The chief contention by the Northern Pacific Company, briefly stated, is that Congress in this land-grant act and in prior laws, as well as in subsequent ones, has used the term "mineral lands" as including only the metalliferous minerals, and that, therefore, only lands containing minerals of that class are excepted from the grant.

We are unable to see how this contention can be sustained upon any other theory than that the general mining laws authorize the exploration, occupation, and

purchase only of lands containing metalliferous minerals. In other words, if the exception of "mineral lands" from railroad and other land grants be held to exclude from such grants only lands chiefly valuable for metalliferous substances, it must also be held that the general mining laws of the United States provide for the disposal only of lands containing like substances. It is not believed that Congress intended one rule to be applied in the determination and classification of lands as mineral within the meaning of the exception of "mineral lands" from railroad and other land grants, and that another and different rule should be applied in the determination and classification of lands as mineral within the meaning of the general mining laws. There is nothing in the acts of Congress making land grants in aid of the construction of railroads and for other purposes, or in the legislation relating to the disposal of the public mineral lands, to show such intention.

In *Davis* v. *Weibold* (139 U. S., 507, 519) this court considered and treated the exception of "mines" from the preemption and settlement laws, and the exception of "mineral lands" from railroad and other land grants, as meaning the same thing; and this is conceded to be true by counsel for the company. (See page 11 of their brief.)

In Lindley on Mines (Vol. I, sec. 86, p. 92) that author, speaking to the subject of "mineral lands" and kindred terms, says:

> Logically the term "mineral lands," and its equivalent terms, whenever used in the acts or

> grants of Congress, either as words of reservation or in the mining laws authorizing their appropriation, has the same limit and breadth of signification. What had been reserved by one series of legislative enactments, and in the different legislative grants, is identically that the appropriation of which is encouraged and sanctioned by another series of laws.

The same author, speaking of the exception of "mineral lands" from railroad and other land grants (Vol. I, sec. 152, p. 170), among other things, says:

> When these railroad acts became laws, the policy of the Government of reserving the mines and mineral lands for the use of the United States was fixed; and if there had been no special clauses of reservation in the acts, the courts would have been forced to the conclusion that such lands were reserved by implication from the donations to railroads, following the doctrine announced with reference to grants of sixteenth and thirty-sixth sections to the States for school purposes.
>
> However, in framing the railroad acts, Congress deemed it prudent to leave no room for dispute or discussion on this score, and inserted in each one of the acts clauses of reservation. The act of July 1, 1862, contained the proviso "that all mineral lands shall be excepted from the operation of this act." The amendatory act of July 2, 1864, provided that "any lands granted by this act, or the act to which this is an amendment, * * * shall not include * * * mineral lands, * * * or any lands returned and denominated as mineral lands."

> It is also provided "that the term 'mineral land,' wherever the same occurs in this act and the act to which this is an amendment, shall not be construed to include coal and iron land." The act of July 2, 1864, incorporating the Northern Pacific Railroad Company, contained reservations and limitations of similar import.

In the act of February 26, 1895 (28 Stat., 684), which provided for the examination and classification of mineral lands within the limits of the Northern Pacific Railroad Company's grant in the States of Montana and Idaho, but which were excepted from the grant on account of their mineral character, it was declared (section 3):

> That all said lands shall be classified as mineral which by reason of valuable mineral deposits are open to exploration, occupation, and purchase under the provisions of the United States mining laws, and the commissioners in making the classification hereinafter provided for shall take into consideration the mineral discovered or developed on or adjacent to such lands, and the geological formation of all lands to be examined and classified, or the lands adjacent thereto, and the reasonable probabilities of such land containing valuable mineral deposits because of its said formation, location, or character: * * * *Provided*, That the word "mineral," where it occurs in this act, shall not be held to include iron or coal.

Here we have an unequivocal legislative declaration to the effect that the exception of "mineral lands" in the Northern Pacific Railroad Company's grant was

intended to embrace, and does embrace, all lands which, by reason of valuable mineral deposits, are subject to exploration, location, and purchase under the mining laws. The act plainly means that all lands containing valuable mineral deposits of whatever nature, whether metallic or nonmetallic, if subject to exploration and purchase under the mining laws, shall be classified as "mineral lands," within the meaning of the exception from this grant, not including, of course, coal and iron lands. In view of this legislative interpretation, it would seem to be clear that in the mind of Congress the term "mineral lands," as used in this grant, is the equivalent of the terms "lands valuable for minerals" and "all valuable mineral deposits," as used in the mining statutes.

We submit, therefore, that the term "mineral lands" and terms of like import, wherever used in the acts of Congress making railroad or other land grants, or in the mining laws, either as words of reservation or as authorizing the disposal of lands thus described, has the same meaning and the same breadth of signification. Lands which had been reserved as "mineral lands" by legislative enactments and in various railroad and other land grants prior to the enactment of the mining laws must be regarded as the same kind of lands the exploration, occupation, and purchase of which are authorized by the mining laws.

The inquiry then arises: What is the true meaning of the term "mineral lands" and other terms the equivalent thereof, such as "lands valuable for minerals,"

"valuable mineral deposits," etc., as these terms are used in railroad and other land grants, and in the United States mining laws? Do metallic minerals only fall within their meaning, or do they embrace minerals of the nonmetallic class as well?

The first act passed by Congress providing for the disposal of mineral lands was the act of July 1, 1864 (13 Stat., 343), wherein it was declared—

> That where any tracts embracing coal-beds or coal-fields, constituting portions of the public domain, and which, as "mines," are excluded from the preemption act of eighteen hundred and forty-one, and which under past legislation are not liable to ordinary private entry—

should be subject to sale at the price and upon the terms therein prescribed. Prior to the passage of this act there was no law for the disposal of coal lands or other mineral lands of the public domain. The preemption act referred to is the act of September 4, 1841 (5 Stat., 453), which made provision for the entry and purchase of the vacant public lands, but declared that no lands on which were situated "known salines or mines" should be subject to entry or sale thereunder. The act of July 1, 1864, which it is important to note became a law the day before the act making the Northern Pacific grant was passed, was an express declaration by Congress that coal, a nonmetalliferous mineral, was included within the exception of "mines" from the preemption act. The case of *Mullan* v. *United States* (118 U. S., 271, 276) involved the direct

question whether coal lands were to be regarded as "mineral lands" within the meaning of that term as used in statutes regulating the disposition of the public domain. This court answered the question in the affirmative, and in its opinion, among other things, said:

> The important question in the case is whether the land, being coal land, was open to selection by the State as lieu school land. This was most elaborately considered by the circuit judge, and his opinion, reported in *United States* v. *Mullan* (7 Sawyer, 466), leaves little to be said on the subject. In *Mining Co.* v. *Consolidated Mining Co.* (102 U. S., 167) this court decided that "the grant of the sixteenth and thirty-sixth sections of public land to the State of California for school purposes, made by the act of March 3, 1853, was not intended to cover mineral lands. Such lands were by the settled policy of the General Government excluded from all grants" at that time, and we quite agree with the circuit judge that "if sections 16 and 36, being mineral lands, do not pass by the terms of the statute, there certainly is no good reason for permitting the same kind of lands to be selected under section 7, in lieu of sections 16 and 36." The confirmatory act of July 23, 1866 (14 Stat., 218, ch. 219), expressly excludes from its operation all selections of mineral land. The case, therefore, turns on the question whether coal lands are mineral lands within the meaning of the term as used in the statutes regulating the disposition of the public domain.

> The first statute which made any reference to minerals on the public lands was that of September 4, 1841 (5 Stat., 453, 455, ch. 16, sec. 10), which provided that no preemption entry should be made on "lands on which are situated any known salines or mines;" and by the act of July 1, 1864 (13 Stat., 343, ch. 205, sec. 1), it was provided that "any tracts embracing coal beds or coal fields, constituting portions of the public domain, and which as 'mines' are excluded from the preemption act of 1841, and which under past legislation are not liable to ordinary private entry," might be disposed of at a price not less than twenty dollars an acre. This is clearly a legislative declaration that "known" coal lands are mineral lands within the meaning of that term as used in statutes regulating the public lands, unless a contrary intention of Congress was clearly manifested. Whatever doubt there may be as to the effect of this declaration on past transactions, it is clear that, after it was made, coal lands were to be treated as mineral lands.

Both by legislative declaration and by decision of this court it is shown that the term "mineral lands," used in laws relating to the disposal of the public domain, includes nonmetallic minerals as well as those of the metallic class.

If it had been intended by the exception of "mineral lands" to exclude from the grant only lands containing metallic minerals, it would have been wholly unnecessary to provide that the exception should not be held to include coal. The fact that the express exclusion of

coal, a nonmetallic mineral, from the exception was necessary in order to exclude it, shows conclusively that the term "mineral lands" was not used in the exception in the sense of embracing only metalliferous metals.

The statutes relating to the disposal of the public mineral lands, as originally enacted, are found in the act of July 1, 1864, already referred to, and in the acts of July 26, 1866 (14 Stat., 251), July 9, 1870 (16 Stat., 217), May 10, 1872 (17 Stat., 91), February 18, 1873 (17 Stat., 465), and March 3, 1873 (17 Stat., 607). The substantive provisions of these several acts have been incorporated in the Revised Statutes of the United States, sections 2318 to 2352, inclusive, under the head of "Mineral Lands and Mining Resources." These provisions, as they appear in the Revised Statutes, in so far as they need be here specifically mentioned, are as follows:

> Section 2318. In all cases lands valuable for minerals shall be reserved from sale, except as otherwise expressly directed by law.
>
> Section 2319. All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and

> not inconsistent with the laws of the United States.

This section is the same as section 1 of the act of May 10, 1872.

Sections 2320 to 2324, inclusive, provide certain rules and regulations to govern the location of—

> Mining claims upon veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits.

Sections 2325 to 2328, inclusive, provide for obtaining title from the Government for lands "claimed and located for valuable deposits" under the preceding sections.

Section 2329:

> Claims usually called "placers," including all forms of deposit, excepting veins of quartz, or other rock in place, shall be subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims; but when the lands have been previously surveyed by the United States, the entry in its exterior limits shall conform to the legal subdivisions of the public lands.

The provisions of this section are the same in effect as originally enacted. (Act July 9, 1870, *supra.*)

Shortly after the act of May 10, 1872, was passed, the Secretary of the Interior requested of the Attorney-General of the United States an official opinion upon the question whether the public lands containing deposits of diamonds were subject to location and

entry under said act. In an opinion (14 Op. A. G., 115) by the Attorney-General, given August 31, 1872, in response to said request, it was stated and held as follows:

> Section 1 of said act provides, "that all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States."
>
> Section 6 of said act also provides the mode in which a patent may be obtained for land claimed and located for "valuable deposits."
>
> Bainbridge, in his work on the law of mines and minerals (p. 1), says: "A mineral has been defined to be a fossil, or what is dug out of the earth. The term may, however, in the most enlarged sense, be described as comprising all the substances which now form or which once formed part of the solid body of the earth, both external and internal, and which are now destitute of and incapable of supporting animal or vegetable life. In this view it will embrace as well the bare granite of the high mountain as the deepest hidden diamonds and metallic ores."
>
> Webster gives the following as the definition of a diamond: "A mineral and gem remarka-

ble for its hardness, as it scratches all other minerals."

* * * * *

Diamonds, then, are clearly "valuable mineral deposits," and the provisions of said act are as applicable to lands containing them, as to lands containing gold or other precious metals. Comprehensive words, no doubt, were used to include as well what might afterwards be discovered as what might be overlooked in an enumeration of minerals in the statute.

Public lands for the purposes of sale are divided into agricultural and mineral lands. The minimum price of the former is $1.25 and the latter $5 per acre. Mineral lands, exclusive of their valuable deposits, are generally worth little or nothing. Prior to the act of July 26, 1866 (14 Stat., 251), it was customary for persons to take those deposits without respect to the rights of the United States. Congress then provided a way in which persons locating lands for mining purposes might acquire title, and other acts have since been passed promotive of the same end.

I think these acts ought to be most liberally construed, so as to facilitate the sale of such lands; for in that way, and not otherwise, can they be made to contribute something to the revenue of the Government, and controversy and litigation in mining localities, to a great extent, be prevented.

September 3, 1872, the Secretary of the Interior addressed to Commissioner Drummond of the General Land Office a communication wherein he referred to

said opinion of the Attorney-General, and with respect thereto said: "I concur in the views therein set forth, and they will guide your official action in cases of this character." (Copp's Mineral Lands, 119.)

July 15, 1873, Commissioner Drummond issued a circular of instructions to surveyors-general and registers and receivers (Copp's Mineral Lands, 61–62), wherein, speaking upon the subject of what constitutes "valuable mineral deposits" within the meaning of the mining laws, he said:

> I have had under consideration a number of letters, mostly from California, wherein inquiries are made as to the proper course to pursue to obtain title to public lands containing valuable deposits of borax, carbonate and nitrate of soda, sulphur, alum, and asphalt. Among them is one from the Nevada Consolidated Borax Company, from which it appears that this company intends to commence the utilization of the alkaline plains of Nevada.
>
> The first section of the act of Congress approved May 10, 1872, reads as follows: "That all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase," etc.
>
> The second section declares "that mining claims upon veins or lodes of quartz, or other rock in place, bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, heretofore located," etc.

The sixth section refers to "a patent for any land claimed and located for valuable deposits."

It will be observed that in the first section of the act the expression "valuable mineral deposits" is employed, while in the second and sixth sections the language is "valuable deposits." Allowing, however, that it was the intention of the lawmakers by this act to dispose of "valuable mineral deposits," the question becomes this, "What is a valuable mineral deposit?"

The meaning of the word valuable need not be discussed. Anything a person is willing to give money for, or that is useful or precious, or that has merchantable qualities, is valuable. The word deposit has always been construed by this office to be a general term, embracing veins, lodes, ledges, placers, and all other forms in which valuable metals have ever been discovered.

In the sense in which the term mineral was used by Congress, it seems difficult to find a definition that will embrace what mineralogists agree should be included. The several authorities consulted in this connection seem to find it an easier task to determine what is not, than what is, mineral. However, in all the works on mineralogy that have come under my notice, borax, nitrate and carbonate of soda, sulphur, alum, and asphalt are classified and discussed as mineral.

Alger's edition of Phillips's Mineralogy speaks of "the crust of the globe as consisting chiefly of earths and earthy minerals." Between earths and minerals there is a clear line of demarkation, and, though difficult to express in a

few words, chemical composition and crystallization are the principal means of tracing the distinction. Webster seems to be the most accurate in his definition of a mineral, for he recognizes chemical composition as the important consideration. He defines a mineral to be "any inorganic species having a definite chemical composition."

From a careful examination of this matter, the conclusion I reach as to what constitutes "a valuable mineral deposit" is this:

That whatever is recognized as a mineral by the standard authorities on the subject, where the same is found in quantity and quality to render the land sought to be patented more valuable on this account than for purposes of agriculture, should be treated by this office as coming within the purview of the mining act of May 10, 1872.

The language of the statute is so comprehensive, and capable of such liberal construction, that I can not avoid the conclusion that Congress intended it, as a general mining law, "to promote the development of the mining resources of the United States," and to afford a method whereby parties holding the possessory right under local laws and regulations could secure title to tracts containing valuable accretions or deposits of mineral substances, except where a special law might intervene, reserving from sale, or regulating the disposal of, particularly specified mineral-bearing lands.

To the several inquiries in the letters referred to, I therefore reply, that lands valuable on

> account of borax, carbonate of soda, nitrate of soda, sulphur, alum, and asphalt, as well as "all valuable mineral deposits," may be applied for and patented under the provisions of the mining act of May 10, 1872.

Prior to the issuance of this circular a special statute had been enacted regulating the disposal of coal lands (act of July 1, 1864, *supra*), and the established policy of the Government had been to reserve salt springs and saline lands from sale absolutely. (*Morton* v. *Nebraska*, 21 Wall., 660; *Hall* v. *Litchfield*, Copp's Mineral Lands, 321; *Salt Bluff Placer*, 7 L. D., 549; *Southwestern Mining Co.*, 14 L. D., 597.) These things were doubtless in the mind of the Commissioner when the circular was issued. They furnish an explanation of the exceptions noted in the circular.

January 30, 1875, Commissioner Burdett of the General Land Office, in the case of William Clayton, held lands containing valuable deposits of umber or fire clay to be mineral lands within the meaning of the mining laws, and to be subject to entry and patent as such. On the same date, in a communication addressed to the surveyor-general of California, the same Commissioner held that lands valuable for deposits of petroleum could be entered and patented under the mining laws. (Sickels's Mining Decisions, p. 491.)

June 28, 1875, it was held by Commissioner Burdett, in the case of C. H. Rolfe (Copp's Mineral Lands, 194), that lands which are more valuable for deposits of limestone or marble than for purposes of agriculture are subject to entry and patent under the mining laws. On

the same day, in the case of J. D. M. Crockwell, it was held by the same Commissioner that "lands containing valuable deposits of kaolin may be patented under the mining acts." (Copp's Mineral Lands, 194.)

The case of William A. Arnold, decided by Commissioner Burdett December 3, 1875 (2 Copp's Land-Owner, 131), involved the question whether lands within the limits of the grant for the benefit of the Union Pacific Railroad, and which contained valuable deposits of mica, were within the exception of "mineral lands" from said railroad grant. It was there held:

> Lands containing valuable deposits of mica may be patented under the provisions of the mining act of May 10, 1872, upon full compliance with the law and instructions. From the operations of the grants to the different railroad companies are excepted all *mineral lands*, except those containing coal and iron, and title to mineral lands can only be acquired under said mining acts.

March 31, 1882, Commissioner McFarland, of the General Land Office, in a communication addressed to A. A. Dewey, Central City, Dakota (9 Copp's Land-Owner, p. 51), stated and held that:

> Lands containing deposits of petroleum have been entered as placers and patented as such. Your inquiries are fully answered, therefore, by stating that lands of that character are subject to entry and disposal according to the law and regulations relating to placer claims.

In the case of *Montague* v. *Dobbs*, decided by the same Commissioner November 23, 1882 (9 Copp's

Land-Owner, p. 165), it was held that lands containing valuable deposits of fire clay or kaolin, or other nonmetalliferous substances, were subject to location and entry as placer claims. In the course of the decision it was said:

> The common understanding of the term "placer" is deposits of débris or wash here and there upon the earth's surface, valuable as a "placer" deposit, because carrying gold; but Congress has enlarged upon the common understanding of the term, and included all deposits, excepting quartz or other rock in place. Section 2329 provides: "Claims usually called 'placers,' including all forms of deposit, with the exception just mentioned, shall be subject to entry and patent, under like circumstances, conditions and proceedings as are provided for vein or lode claims."

In a decision by the same Commissioner September 18, 1884, in the case of H. P. Bennett, jr. (3 L. D., 116), it was, among other things, held as follows:

> In his application for patent Mr. Bennett claims the land as a "deposit of valuable building rock." The register reports that "it is evidently not agricultural land, and there appears to be no lode claim within it or in its vicinity;" also, that he has taken some pains to investigate its character in an informal way, and is satisfied that it is valuable only for the building stone that it contains.
>
> * * * * *
>
> Section 2319, Revised Statutes, declares all valuable mineral deposits in lands belonging to

> the United States, and the lands in which such deposits are found, to be free and open to exploitation, occupation, and purchase by citizens of the United States and those who have declared their intention to become such. That stone is a mineral, see the cases cited on pages 509 and 510, C. M. L., 2d ed.; also *Maxwell* v. *Brierly*, 1 B. L. P., 98. Section 2329 provides for the entry and patent of "claims usually called placers, including all forms of deposit, excepting veins of quartz or other rock in place." In the present case, as the land has been shown to "contain valuable mineral deposits," but no "veins of quartz or rock in place," I think that entry may properly be allowed as a placer claim.

The case of W. H. Hooper, decided by the Secretary of the Interior October 8, 1881 (1 L. D., 560), involved an entry made under the mining laws of lands containing valuable deposits of gypsum. In the course of his decision the Secretary said:

> Section 2318, Revised Statutes, provides that "in all cases lands valuable for minerals shall be reserved from sale, except as otherwise expressly directed by law."
>
> Section 2319 provides that:
>
> "All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, * * * under regulations prescribed by law."

Under all authorities gypsum is a mineral, but your decision holds that it is of a similar formation to limestone, and that section 2318 only embraces such lands as contain metals or other substances which give the land greater special value than that of land containing limestone in any of its forms. Your office has, however, held (2 C. L. O., 66), in the case of Rolfe, that public lands more valuable on account of deposits of limestone and marble than for agriculture, may be patented under the mining laws; and in its circular of July 15, 1873, it held "that whatever is recognized as a mineral by the standard authorities on the subject, where the same is found in quantity and quality to render the land sought to be patented more valuable on this account than for purposes of agriculture, should be treated as coming within the purview of the mining act of May 10, 1872," and as being "a valuable mineral deposit." I concur in these views.

The proceedings of the appellants appear to be regular, and there is no adverse claimant. They allege that the tract embraces a deposit of almost pure gypsum, and is not a mere limestone bed; and that they use the same as an article of commerce, and not for agriculture. I find, however, no proof as to the comparative value of the land for mineral or agricultural purposes.

I therefore direct that you cause an investigation to be made in this respect. Should it be found that it has greater value for the former than for the latter purpose, a patent should issue as applied for.

In a communication by Secretary Teller to Commissioner McFarland, dated January 30, 1883 (1 L. D., 561), relating to public lands containing valuable deposits of borax, the carbonate and nitrate of soda, sulphur, alum, asphalt, etc., the Secretary said:

> It was early determined by the Department that the act of May 10, 1872, which describes certain lands containing valuable mineral deposits, was applicable tc lands containing deposits of borax, carbonate and nitrate of soda, sulphur, alum, and asphalt; and I believe that from the passage of the law until the present time the definition of the term "valuable mineral deposits" has been such as to include the minerals and alkaline substances named. I understand that entries of borate lands have been allowed under the provisions of the act of 1872, and the regulations made in accordance therewith.
>
> It is the desire of the persons interested that the regulations which were in existence, having special reference to the application for patent for placer claims—namely, the circular of October 31, 1881—should be continued in force so far as they relate to deposits of borax, etc., as mentioned above.
>
> Believing that practical effect should be given to the mining laws of the United States, I am of the opinion that to apply the new regulations to such entries would result in excluding such lands from sale and depriving the people of the benefit of the use of these natural deposits. I therefore direct you to permit the entry of public lands containing valuable deposits of borax,

> the carbonate and nitrate of soda, sulphur, alum, and asphalt in the States of California and Nevada and the Territories of Arizona, Utah, and Wyoming—in which section of country I am informed the deposits are present—under the regulations of October 31, 1881.

In the case of *Maxwell* v. *Brierly*, decided by Secretary Teller April 16, 1883 (10 Copp's Land-Owner, p. 50), the question was whether land chiefly valuable for limestone was subject to entry under the mining laws. The Secretary, in passing upon the question, addressing the Commissioner of the General Land Office, said:

> Your decision was also prior to that of my predecessor, who held, October 8, 1881, in the case of Hooper (Copp, November, 1881), in accordance with your circular instructions of July 15, 1873, that whatever is recognized as a mineral by standard authorities, and is found in such quantity and quality as to render the land more valuable on this account than for agriculture, was "a valuable mineral deposit" within the purview of the act of May 10, 1872, and hence that gypsum and limestone so found subjected the tract to the operation of the mining laws, as has been held under other rulings, with respect to asphaltum, borax, auriterous cement, fire clay, kaolin, mica, marble, petroleum, slate, and other substances, under like conditions.
>
> Concurring in these views, I am of the opinion that the tract in question is, under the testimony, more valuable for its limestone than for

agricultural purposes, and hence is subject to entry under the mineral laws.

In the case of Samuel E. Rogers, decided by Secretary Lamar December 16, 1885 (4 L. D., 284), certain locations under the placer mining laws embracing lands valuable for deposits of oil were sanctioned and sustained.

The case of Elias Jacob (7 Copp's Land-Owner, 83) is referred to by counsel for the company. That case was decided by Commissioner Williamson of the General Land Office, August 5, 1880, and was never appealed to the Secretary of the Interior. The decision is contrary to decisions in other cases, both prior and subsequent to its date. It was not approved by the Secretary of the Interior, or followed by the Commissioner of the General Land Office. It stands alone among the earlier decisions on the subject as utterly out of harmony with the principles uniformly announced in those decisions. Its doctrine was distinctly repudiated by the Secretary of the Interior in the case of W. H. Hooper, *supra*, decided about a year later.

Such are some of the rulings and decisions of the Land Department made shortly after the enactment of the mining laws by the officers of the Government charged with the administration of those laws and with the administration and adjustment of railroad and other land grants. It is submitted that as contemporaneous construction these rulings and decisions are entitled to great weight. Patents have been issued in accordance with the principles announced in them, embracing

many thousands of acres of the public lands. They have been, with the one exception stated, consistently and uniformly to the effect that the terms "mineral lands," "lands valuable for minerals," and "valuable mineral deposits," whenever used in connection with the public lands, embrace not only metallic minerals, but all valuable mineral deposits, metallic or non-metallic, wherever lands containing such deposits are shown to be more valuable on account thereof than for agricultural purposes; and that such lands are subject to disposal only under the mining laws.

The definition of the word "mineral" adopted by Commissioner Drummond in the circular of July 15, 1873, *supra*—

> That whatever is recognized as a mineral by the standard authorities on the subject, where the same is found in quantity and quality to render the land sought to be patented more valuable on this account than for purposes of agriculture—

should be treated as coming within the purview of the mining laws, has been uniformly accepted as the true interpretation of said laws.

In the case of *Pennoyer* v. *McConnaughy* (140 U. S., 1, 23) this court said:

> The principle that the contemporaneous construction of a statute by the executive officers of the Government, whose duty it is to execute it, is entitled to great respect, and should ordinarily control the construction of a statute by the courts, is so firmly embedded in our juris-

prudence, that no authorities need be cited to support it. On the faith of a construction thus adopted, rights of property grow up which ought not to be ruthlessly swept aside, unless some great public measure, benefit, or right is involved, or unless the construction itself is manifestly incorrect.

We refer in this connection to the definition of the term "mineral lands" and other kindred terms as used in the mining laws and to denote exceptions from railroad and other land grants, given by Lindley in his work on Mines (vol. 1, sec. 98, p. 116). That author says:

> While it is difficult to formulate a definition sufficiently comprehensive in itself to cover all possible exigencies, we think that a conservative application of the rules governing statutory construction, heretofore enumerated in connection with the adjudicated cases and rulings of the land department, permit us to deduce the following:
>
> The mineral character of the land is established when it is shown to have upon or within it such substance as—
>
> (*a*) Is recognized as mineral, according to its chemical composition, by the standard authorities on the subject; or
>
> (*b*) Is classified as a mineral product in trade or commerce; or
>
> (*c*) Such a substance (other than the mere surface which may be used for agricultural purposes) as possesses economic value for use in

trade, manufacture, the sciences, or in the mechanical or ornamental arts;

And it is demonstrated that such substance exists therein or thereon in such quantities as render the land more valuable for the purpose of removing and marketing the substance than for any other purpose, and the removing and marketing of which will yield a profit; or, it is established that such substance exists in the lands in such quantities as would justify a prudent man in expending labor and capital in the effort to obtain it.

The same author (vol. 1, sec. 162, p. 188–189), after an extended discussion of the exception of "mineral lands" from railroad land grants, among other things, says:

We are authorized to deduce the following general conclusions from the foregoing exposition of the law:

* * * * *

(4) The term "mineral land," as used in the reservation clauses of railroad grants, includes all valuable deposits, metallic and nonmetallic, which are or may be subject to entry under the mining laws, except coal and iron, where these substances are excepted out of the mineral reservation.

(5) Mineral lands within either the primary or indemnity limits of railroad grants, prior to patent or certification belong to the public domain, and are open to exploration and purchase under the mining laws, the same as other public mineral lands.

In another part of this work (vol. 1, sec. 96, p. 113) Mr. Lindley states the following American rules of statutory interpretation as applicable to the subject under consideration:

> In addition to the ordinary canons of statutory interpretation, there are certain recognized rules applicable to the acts of Congress which are within the scope of this treatise. These may be briefly enumerated as follows:
>
> (1) The mining laws are to be read in the light of matters of public history, relating to the mineral lands of the United States;
>
> (2) Where a statute operates as a grant of public property to an individual, or the relinquishment of a public interest, that construction should be adopted which will support the claim of the Government rather than that of the individual.
>
> (3) In the case of a doubtful or ambiguous law, the contemporaneous construction of those who have been called upon to carry it into effect is entitled to great respect, and ought not to be overruled without cogent reasons.

We might add a fourth rule, deducible from the foregoing, and from the current of American authority and decisions of the land department, and that is, that the word "mineral," as used in these various acts, should be understood in its widest signification. We do not conceive that there is anything in the context of the several acts, or in their nature, to restrict its meaning. This is practically the English rule announced by Mr. Ross Stewart, which has heretofore been

referred to, and which is amply supported by the highest English authority.

Again (vol. 1, sec. 137, p. 153), Mr. Lindley says:

> In a preceding chapter, we have endeavored to establish a general definition of the term "mineral lands," as that term is used in the various mining acts of Congress; and we have also attempted to formulate definite rules of statutory construction to be applied to such acts and these terms when found therein.
>
> Thus, we have heretofore said that the word "mineral," as used in these various acts, should be understood in its widest signification, and that all substances which are classified as a mineral product in trade or commerce, or possess economic value for use in trade, manufacture, the sciences, or the arts, fall within the designation of the term "mineral." That this is true as a general rule, we have no doubt. We are firmly convinced that it should be accepted as a universal rule in dealing with the public lands.

In the case of *Conlin* v. *Kelly*, decided by the Department January 2, 1891 (12 L. D., 1), it was held that stone useful only for general building purposes does not render land containing the same subject to appropriation under the mining laws, or except it from preemption entry. This was a departure from the earlier rulings on the subject. In the decision it was stated, however, that—

> The stone in the tract in controversy has no peculiar property or characteristic that gives it

especial value, such as attaches to gypsum, limestone, mica, marble, slate, asphaltum, borax, auriferous cement, fire clay, kaolin, or petroleum. Its characteristic appears to be its hardness, and its value, in this particular mine, appears to be its proximity to the town of Alexandria, which has come into some prominence, having been chosen as a county seat since the entry in question was made.

It is important to be noted that soon after this decision was rendered and promulgated in printed form, the act of August 4, 1892 (27 Stat., 348), was passed, especially declaring that lands "chiefly valuable for building stone" may be entered "under the provisions of the law in relation to placer mineral claims." There can be no question that the passage of this act was the direct result of the decision in the Conlin-Kelly case. This is clearly shown by the report of the House Committee on Public Lands in support of the bill when it was pending before Congress (H. R. Report 1242, Fifty-seventh Congress, first session), wherein it was said:

> The first section in the bill as passed by the Senate is made necessary by certain recent rulings in the Interior Department which the committee calls attention to.
>
> In the case of *Rosse* v. *Wainman* (14 M. & W., 859), (same case, 2 Exch., 200, and 15 L. J., 67), it was held (quoting syllabus):
>
> "The term 'mineral' is more frequently applied to substances containing metals, but in its proper sense includes all fossil bodies or matters dug out of mines; in this sense beds of stone may be included in the word minerals."

So, in the case of *Micklethwait* v. *Winter*, 6 Exch., 644 (same case, 5 Eng. L. & E., 526); and *Midland R. Co.* v. *Checkley*, Law R., 4 Eq., 24, it was held that stone taken from quarries is a mineral.

The above has been the construction given the mining laws of the United States by the Interior Department since the act of 1872 was passed, until a very recent date, and even now all kinds of stone are held to be subject to mineral entry except building stone, the test applied being uniform with regard to all mineral substances, viz, whether or not the land containing such substances is more valuable therefor than for agricultural purposes. In the case of *Conlin* v. *Kelly*, decided in the Department January 2, 1891, and reported in 12 Land Decisions, 1, however, it was held that lands which contain deposits of building stone only are not subject to entry under the mining laws. This decision has brought dismay and threatened ruin and disaster to many citizens who in good faith, relying on the settled and long-continued procedure of the General Land Office, had invested large sums of money in the development of stone quarries upon the public lands, expecting to obtain patents under the mining laws. It changes what had become a recognized rule of property, and the committee think this is a matter which justly demands the action of Congress to fix the status of such lands without the possibility of doubt.

Prior to the date of the above decision the rulings had been practically uniform the other way. As early as June 28, 1875, Commissioner

Burdett, in a letter to H. C. Rolfe, said that "public lands more valuable on account of deposits of limestone and marble than for agriculture may be patented under the mining laws." (2 Copp's L. D., 66.)

This Rolfe letter was referred to with approval by Secretary Kirkwood in deciding the case of W. H. Hooper who had located a mining claim on gypsum deposits. The Secretary allowed the entry. (See 8 Copp's L. O., 120.)

In the Colorado case of *Maxwell* v. *Brierly* (10 C. L. O., 50), Secretary Teller again cited the Rolfe letter and the Hooper decision in overruling the action of the Commissioner in rejecting a placer mining claim for the land, because of its *limestone* deposits.

In the case of H. P. Bennett, jr. (11 Copp's L. O., 213), another Colorado case, Commissioner McFarland followed the decision in *Maxwell* v. *Brierly* (*supra*), and held that land valuable on account of its deposits of *building stone* (granite) is subject to entry under placer location. This decision was rendered September 18, 1884. It has been followed uniformly in the General Land Office ever since, and the records there show the patenting of hundreds of such claims. All such entries, however, are now suspended, awaiting the result of the proposed legislation.

The object of the proposed law is simply to direct that building stone be included within the definition of the term "mineral." It will not, in any manner, affect any vested rights, except to confirm such as have been established

> under the former construction of the law. No one can be injured by its passage, while great relief will be given to *bona fide* investors and claimants.

The enactment of this statute, therefore, instead of tending to show that "Congress in 1892 regarded stone as not capable of acquisition under the mining laws previously passed," as suggested by counsel for the company (p. 24 of their brief), furnishes, in the light of the conditions which led to its enactment, as shown by said report, the strongest possible evidence to the contrary. It clearly appears that Congress regarded the ruling in the Conlin-Kelly case an unwarranted departure from the construction which had been given the mining laws by the Land Department ever since their enactment, and a departure so serious in its nature and results as to demand legislative disapproval. We submit that neither the act nor the decision which caused its passage furnishes any support to the company's contention. The act does not, for the reason that the circumstances attending its passage prove beyond question that Congress believed the uniform interpretation of the mining laws prior to the decision to be correct. The decision does not, for the reason that, while holding common building stone not to be a mineral, it in effect holds limestone, marble, asphaltum, and other designated nonmetallic substances to be minerals.

In *McGlenn* v. *Wienbroeer*, decided by the Secretary of the Interior October 12, 1892 (15 L. D., 370), it was held that land principally valuable for stone is min-

eral land within the meaning of the mining laws, and subject to entry and patent under the provisions relating to placer claims. In the course of the decision (p. 373) it was said:

> From all the facts of this case, there can be no doubt but that this land was principally valuable on account of the stone which it contained. Practically, it possessed no other value, and was comparatively worthless for agricultural purposes. The question then is: Did these valuable deposits of stone render the land subject to entry under the mineral laws? In other words: Is stone a mineral within the meaning of these laws?
>
> This question has been passed upon, both by the courts and by the Department. In Copp's United States Mineral Lands, in his digest of court decisions, on page 424, several cases are cited. In that of *Rosse* v. *Wainman* (14 M. & W., 859) it was said "the term 'mineral' is more frequently applied to substances containing metals, but in its proper sense, includes all fossil bodies or matters dug out of the mines; in this sense, beds of stone may be included in the word mineral." In the case of *Micklethwait* v. *Winter* (5 English Law and Equity, 526) it was said: "Stone taken from quarries is a mineral."
>
> In the case of William H. Hooper (1 L. D., 560), it was held that "whatever is recognized as a mineral by the standard authorities on the subject, where the same is found in quantity and quality to render the land sought to be patented more valuable on its account than for

> agricultural purposes, is mineral within the meaning of the mining laws." In the case of *Maxwell* v. *Brierly*, decided by Secretary Teller April 16, 1883 (10 C. L. O., 50), it was held that "land more valuable for its deposits of stone, or whatever is recognized as mineral, than for agriculture, is mineral land, and subject to sale under the mineral laws."
>
> Applying the doctrine of the last case cited, to the one at bar, and the mineral application of Wienbroeer must be allowed, while under section 2318 of the Revised Statutes of the United States, the homestead entry of McGlenn can not stand.

In this case the application for placer patent was filed prior to the act of August 4, 1892, *supra*, but the application was sustained as strictly within the provisions of the placer mining laws.

In the case of *Van Doren* v. *Plested*, decided June 9, 1893 (16 L. D., 508), it was held that land containing a deposit of sandstone suitable for building and ornamental purposes, and chiefly valuable as a stone quarry, may be entered under the placer-mining laws. In the course of its decision the Department said:

> The only question presented by the record is as to the character of the land, and the appeal does not question your findings of fact, but simply claims that you erred in deciding that the case of *Conlin* v. *Kelly* (12 L. D., 1) should control the judgment in this.
>
> The case at bar is almost exactly similar in all essential features to that of *McGlenn* v.

Wienbroeer (15 L. D., 370). The lands join; the testimony as to its character is substantially the same, in some instances the same witnesses testified in both cases. In that case a distinction was drawn between it and *Conlin* v. *Kelly* (*supra*), and it was decided that the rule in the latter could not control in this. Hence, it is only necessary to say that it was error to apply the doctrine in *Conlin* v. *Kelly* to this character of cases.

The attempt of the protestant to show that the land is valuable for agricultural purposes was, in my opinion, far from convincing. It is shown that the land is on a mesa, rising abruptly from the Purgatoire River to an altitude of about 480 feet above the river, and that the elevation of the mesa above the so-called lowlands of the tract is from 150 to 250 feet. The character of the land on each mineral location is said to be very steep bluffs at the edge of the mesa from 10 to 60 feet in height, below which is a talus of débris extending to the lowland. The perpendicular bluffs are composed of massive sandstone, in stratified layers, from 50 to 60 feet in thickness. The talus, upon which it is claimed vegetation grows, is composed of earth and stones of various sizes, chiefly, however, of decomposed sandstone lying upon shale. The estimate of the various witnesses as to the amount of land that could, under favorable circumstances, be cultivated varies from 2 acres to 60, but I think a fair preponderance of the evidence shows that it would not exceed 8. None of it has ever been culti-

vated and certain it is that it can not be without irrigation, and I am satisfied from the testimony that it is a practical impossibility to ever successfully convey water upon the tract. And I think it is proved by witnesses who have been engaged in the stock business in that vicinity for from ten to thirty years, that it possesses no value as a stock range in its present condition, and, granting that water could be found on or conveyed to it for stock to drink, I think the area that could be grazed is so small as to be wholly profitless.

On the other hand, it is indisputably shown that the sandstone is of a superior quality for building and ornamental purposes, and as such is extensively utilized, and that the land as a matter of fact is only valuable for a stone quarry. Therefore, following the rule announced in *McGlenn* v. *Wienbroeer* (*supra*), it was error in not permitting it to be patented as a placer.

This was also a case where the application for placer patent was filed prior to the act of August 4, 1892.

In the case of Piru Oil Company, decided February 13, 1893 (16 L. D., 117), an application for patent, based upon four placer locations, embracing an aggregate of nearly 640 acres of land containing valuable deposits of oil, was recognized and sustained as within the provisions of the mining laws.

In *Clark et al.* v. *Ervin*, decided February 13, 1893 (16 L. D., 122), it was held that land chiefly valuable for common building stone was not, by reason of such

fact, excluded from entry under the settlement laws. This case is something like that of *Conlin* v. *Kelly* (*supra*), and it is worthy of note that the land was shown to be worth at least $5 per acre for agricultural purposes.

The case of *Hayden* v. *Jamison*, decided June 21, 1893 (16 L. D., 537), cited by counsel for the company, has been several times before the Department. The contest was between a homestead entryman and a mineral claimant who alleged the land to be chiefly valuable for stone. The first decision was rendered September 8, 1892 (15 L. D., 276), and it was held that the homestead entry should be canceled. In a later decision (16 L. D., 537) it was stated and held as follows:

> While I find from the evidence now before me that this land is chiefly valuable for building stone, I am not satisfied that it is entirely incapable of cultivation and unfit for grazing, and, as Jamison claims that he can produce evidence of its agricultural qualities, and that he failed to do so at the hearing because he understood that question not to be in issue, I think justice will be best subserved by giving him an opportunity to do so now.
>
> I am further persuaded that this is the proper course to pursue by a letter in the record before me from the contestant, of date February 15, 1892, stating that the land embraced in the entry is very valuable ($300,000), that it contains, besides building stone, large deposits of fire clay, limestone, marble, and gypsum, and

asking that he be allowed to prove this, if the placer claim can not be sustained.

If these minerals are found in paying quantities upon the land, it is subject to entry under the mining laws, as construed by this Department, and that fact, if proven, may very materially affect the rights of the agricultural claimant.

A rehearing was thereupon had, and, upon the new proof submitted, it was held that the homestead entry should be sustained as against the contention of the mineral claimant. That decision, however, was overruled on review (26 L. D., 373) when, upon further consideration of the case in the light of the authorities on the subject, the Department sustained the mineral claim as against the homestead entry. It was there said:

Inasmuch as it is practically admitted that this land is more valuable for the red sandstone it contains than for agricultural purposes, it remains to be seen whether it was subject to disposition under the placer mining law prior to August 1, 1892. If it was, then the decision under review was error and must be vacated, for the reason that a mineral location thereof was made prior to the homestead entry of Jamison and for the further reason that if it was subject to placer location it is mineral land and title can not be acquired thereto under the homestead law if its character is known prior to the issuance of final certificate.

* * * * *

Unquestionably, the great weight of authority is to the effect that sandstone is a mineral substance.

It having been found, and not being now questioned, that the land in controversy is more valuable on account of its sandstone deposit than for agriculture, this case comes squarely within the rule above set out, and it results that the homestead entry of Jamison as to the land in conflict was and is unauthorized and can not be upheld.

In *Shepherd* v. *Bird et al.*, decided July 7, 1893 (17 L. D., 82), it was held that land containing stone suitable for making lime may be entered under either the placer mining laws or the timber and stone act of June 3, 1878 (20 Stat., 89). The Department there said:

> Under the decisions of this Department stone suitable for making lime may properly be entered as placer ground. *Maxwell* v. *Brierly* (10 C. L. O., 50); *Conlin* v. *Kelly* (12 L. D., 1). It may also be properly entered or purchased under the stone and timber act, *supra*, and I think, in considering the rights of Shepherd and Gibbons in this case, the priority of their respective claims must be considered, and the right given to him who is found first to have asserted his claim.

In *Gray* v. *Todd*, decided February 12, 1894 (18 L. D., 58), it was held that land chiefly valuable for phosphate deposits is mineral in character and subject to entry only under the placer mining laws, and that a homestead entry made with knowlege that the land embraced therein contains a valuable deposit of phosphates is illegal and must be canceled.

In the case of *Paris Gibson et al.* (21 L. D., 327) it

was held that lands valuable for ordinary building stone, embraced within entries under the placer mining laws allowed at a time when such entries were recognized under the departmental rulings, were excepted from the operation of the grant of school lands to the State of Montana by the act of February 22, 1889 (25 Stat., 676, 684). In that case the Department said:

> Inasmuch as the practice of the Land Department at the date of the mineral location herein was to allow placer entries on lands of the character herein applied for, and it appearing that these entries were made in good faith, believing the lands were subject to appropriation under the mineral laws, and it further appearing that payment has been made and final certificate issued, I am of opinion that the entries should be passed to patent.
>
> * * * * *
>
> Contemporaneously with the passage of the act of July 9, 1870 (16 Stat., 217), the Land Office held that lands chiefly valuable for building stone were mineral lands and subject to location as placer. This view was sustained by the Department (see H. P. Bennett, jr., 3 L. D., 116, and cases there cited). Parties acted under the law as then construed, and I do not intend to express the opinion that this decision was erroneous.

In the case of Union Oil Company, decided August 27, 1896 (23 L. D., 222), lands containing valuable deposits of petroleum were held not to come within

the contemplation of the mining laws, and therefore not within the exception of "mineral lands" from railroad land grants. This decision was based squarely on the proposition that under the mining laws only lands containing the precious metals were subject to location, entry, and purchase. It was a distinct departure from the long line of earlier decisions of the Department on the subject, which had been uniformly the other way. The same case came again before the Department November 6, 1897 (25 L. D., 351), upon a motion for review, seasonably filed, and which operated as a supersedeas during its pendency, and, after full consideration and discussion, the original decision was set aside and vacated. Speaking of the original decision, Lindley (vol. 1, sec. 138, p. 155) says:

> The cases of *Downey* v. *Rogers*, *Samuel E. Rogers*, *Roberts* v. *Jepson*, and *Piru Oil Company*, followed and read in the light of the antecedent practice of the Land Department, recognize petroleum as a mineral product, and lands containing it in sufficient quantities to make them more valuable for oil purposes than for any other as being mineral lands. Secretary Smith comments on these four cases and declines to accept them as tending to establish the doctrine for which we are contending.

The Secretary cites the Pennsylvania case of *Dunham* v. *Kirkpatrick*, to the effect that a reservation of "mineral" in a deed does not include petroleum, although it is admitted petroleum is technically a mineral.

This decision is in conflict with prior cases

decided in Pennsylvania, and has been practically overruled or its doctrine ignored by the same court in a later case.

The ruling of Secretary Smith as to the mineral character of petroleum is in direct opposition to a decision in the United States circuit court (ninth circuit), wherein Judge Ross, sitting as circuit judge, says:

"The premises in controversy are oil-bearing lands, the Government title to which, under existing laws, *can alone be acquired pursuant to the provisions of the mining laws relating to placer claims.*"

We think, considering the previous practice of the Land Department and its construction of the mining laws as applied to oil lands, as well as the weight of judicial decisions, Secretary Smith was in error in deciding that lands containing petroleum could not be acquired under the mining laws, but were open to selection under grants to the States.

It is important, in this connection, to refer to the act of February 11, 1897 (29 Stat., 526), wherein it was declared:

That any person authorized to enter lands under the mining laws of the United States may enter and obtain patent to lands containing petroleum or other mineral oils, and chiefly valuable therefor, under the provisions of the laws relating to placer mineral claims: *Provided*, That lands containing such petroleum or other mineral oils which have heretofore been filed upon, claimed, or improved as mineral, but not yet patented, may be held and patented under

the provisions of this act the same as if such filing, claim, or improvement were subsequent to the date of the passage hereof.

The language of this act clearly indicates, and the report of the Public Lands Committee of the House made while the bill was pending before Congress unmistakably shows, that the act was passed for the purpose of restoring the practice which had prevailed in the Land Department prior to the original decision in the Union Oil Company case. From said report we quote as follows:

> Public lands containing petroleum and other mineral oils have been held and patented under the placer mining acts of the United States for many years past. In 1 Land Decisions, page 560, Mr. Teller, then Secretary of the Interior, said that mineral so found "subjected the tract to the operation of the mining laws, as has been held under other rulings with respect to * * * petroleum * * * and other substances under like conditions."
>
> The first patent issued by the Government under the placer-mining acts for lands containing petroleum was in the Los Angeles district, in California, mineral entry No. 18, March 22, 1880. Other entries have been made and patents issued since that time on lands containing petroleum in several of the public-land States, notably in the States of California and Wyoming.
>
> The first ruling in the matter was that contained in the letter of instructions written by Commissioner Burdett to the United States

surveyor-general of California, January 30, 1875, and was to the effect that petroleum-bearing lands were enterable under the mineral-land laws. (Copp's Land Owner, vol. 1, p. 179; Copp's Mineral Lands, second edition, p. 160.) Another letter to the same effect was written by Commissioner McFarland, March 31, 1882. (Copp's Land Owner, vol. 9, p. 51.) Under these rulings and in view of the uniform practice of the land department for many years, considerable quantities of lands have been filed upon, held, and improved for the purpose of developing oils in various of the public-land States, and in many instances large sums of money have been expended in such development.

Under a decision of the Secretary of the Interior, dated August 27, 1896, in the case of mineral entry No. 140, Los Angeles district, California, the Secretary held that lands containing oils could not be patented under the placer mining acts, for the reason that the acts did not originally contemplate the extension of their provisions to lands of this character. It has never been held by any authority that the provisions of the placer acts were not adequate to meet the conditions surrounding the development of mineral oils. The effect of the above-cited decision of August 27, 1896, is to preclude the possibility of obtaining title to lands containing oils, and as there are large areas of such lands in various of the public-land States, and as upon these lands in many instances large expenditures have already been made, and as it is manifestly for the public good that there

should be some provision whereby these lands may be held and patented, the committee believe this bill should pass.

This legislative action, taken so promptly after the departure from the earlier rulings and long-established practice with respect to oil lands, is very significant, and can hardly be regarded as less than an emphatic disapproval by Congress of the changed ruling. What has been heretofore said with reference to the act of August 4, 1892, is equally applicable here.

One other decision by the Department was based upon the proposition that only metallic minerals are within the contemplation of the exception of "mineral lands" from railroad and other land grants. That was in the case of *Tucker et al.* v. *Florida Railway and Navigation Company*, decided December 1, 1894 (19 L. D., 414), cited by counsel for the company on page 27 of their brief. The case, however, was distinctly overruled in the later case of *Pacific Marble Company* v. *Northern Pacific Railroad Company et al.* (25 L. D., 238), hereinafter to be referred to.

Speaking of the rulings of the Secretary of the Interior in the two cases of *Union Oil Company* and *Tucker et al.* v. *Florida Railway and Navigation Company*, Lindley (vol. 1, sec. 158, p. 183) says:

> The vice of the distinguished Secretary's reasoning is found in his assumption that after the passage of the railroad acts, and before title vests under them, Congress has no power to change its policy or enlarge the scope of its legislation with respect to mineral lands. That

this view is erroneous, we think we have fully demonstrated in the preceding article on the subject of grants to States for educational purposes.

In the final decision in the Union Oil Company case (25 L. D., 354) the Department, after referring to the earlier rulings on the subject of the disposal of oil lands, said:

> Such are some of the reported rulings and decisions of the Land Department, made shortly after the mineral-land laws became a part of the public-land system, and by the officers of the Government, charged with their administration. As contemporaneous and uniform interpretation, they are entitled to great consideration.
>
> From an examination of the records of your office, which I have caused to be made, it is ascertained that ever since the circular of July 15, 1873, until the date of the decision complained of, the practice of allowing entry and patent for lands chiefly valuable for their deposits of petroleum, under the law and regulations relating to placer claims, has been continuous and uniform. Under this practice a large number of patents have been issued, and very large and valuable property interests have been acquired. Until the decision in this case, the correctness of the practice does not appear to have been questioned, and for that reason no case distinctly presenting such a question ever reached this Department. The case of the Piru Oil Company (16 L. D., 117) was a contest between said company as applicant for patent under the mining laws, for

several "oil mine" claims, and a homestead entryman of a part of the lands embraced in the mineral locations; but no question as to whether the lands were of the character subject to mineral entry, appears to have been discussed. The decision, which was in favor of the mineral claimant, was nevertheless an adjudication to the effect that oil lands are mineral lands, subject to location and entry under the mining laws, if the requisite conditions as to value are shown to exist; otherwise the mineral locations could not have been sustained as against the homestead entry subsequently allowed. The principle, though not discussed, was necessarily involved, and the decision sustaining the mineral locations and entry, is therefore not without weight. The case of *Roberts* v. *Jepson* (4 L. D., 60) was a similar contest. It was there held by Secretary Lamar that the mineral claimant had "failed to establish the character of the land as oil land, and, therefore, subject to location under the mineral laws."

Sufficient has been said to show that ever since the circular of July 15, 1873, until the date of the decision under review, the practice of the Land Department has uniformly been to allow entries under the mining laws of lands containing valuable deposits of petroleum, and that this view has obtained to such an extent that many titles to lands patented as mineral because of the valuable oil deposits contained therein, are now dependent upon it. Such having been the generally accepted view for so long a time, and extensive property rights hav-

> ing been acquired under the law as thus construed by the officers of the Government whose duty it was to administer it, the demands of simple justice would seem to require that there should be no departure from that construction at this late day unless called for by the clearest evidence of error, as well as the strongest reasons of public policy.

The circular of July 15, 1873, referred to in the decision, is the circular which was issued by Commissioner Drummond, of the General Land Office (Copp's Mineral Lands, 61–62), hereinbefore mentioned and quoted from.

The case of *Pacific Coast Marble Company* v. *Northern Pacific Railroad Company et al.*, decided by the Department September 9, 1897 (25 L. D., 233), involved the question whether lands, admittedly of great value for deposits of marble, and valuable only on account of such deposits, were within the exception of "mineral lands" from the grant to the Northern Pacific Railroad Company, and from the school grant to the State of Washington. In that case the mining statutes of the United States, and the decisions of the Land Department and of the courts in relation to the construction of those statutes, were reviewed at length. The Department held marble to be a mineral within the meaning of the mining laws, and that lands containing valuable deposits of marble, and chiefly valuable because of such deposits, were excepted from the grant to the railroad company and from the grant to the State for school purposes. For convenience of

reference we make extensive quotations from the decision in this case. After stating the continuous and uniform interpretation given the mining laws by the Land Department for many years, it was said:

> Such are some of the rulings and decisions of the land department, made shortly after the mineral-land laws became a part of the public-land system, and by the officers of the Government charged with their administration; and as contemporaneous and uniform interpretation, they are entitled to great weight.
>
> These and other rulings on the subject, with few exceptions, have been consistently and uniformly to the effect that the mining laws embrace not only lands containing metallic minerals, but all valuable mineral deposits of whatever kind or nature—whether metalliferous or fossiliferous—wherever the lands containing them are shown to be more valuable on account thereof than for agricultural purposes. The value of the mineral deposit, rather than its kind, appears to have been the controlling factor in determining whether the lands containing it were subject to entry and patent under the mining laws.
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> * * * * *
>
> The interpretation thus shown to have been adopted at an early date by the Land Department, and followed with practical uniformity for over twenty years, is attacked as being obnoxious to well-established rules of construction. It is insisted that the particular and specific words, "gold, silver, cinnabar, lead, tin, copper," as used in section 2320 of the Revised

Statutes, must be considered as furnishing a guide to, and placing a limitation upon, the meaning to be given the general words which immediately follow, and that in view thereof the general words must be held to include only deposits of the same kind or nature as those designated by the preceding particular words—that is, mineral deposits of the kind or nature *ejusdem generis* with gold, silver, cinnabar, lead, tin, or copper—or, in other words, metalliferous ore. The same position is taken with reference to section 2329. The specific word there is "placers." That word, it is said, should be restricted to its technical meaning—places where gold is found—and further, that the general words—"including all forms of deposit"—which follow, must be held, under the rule, to include only the different forms of placer-gold deposits.

The Department is not unaware of the well-settled rule of statutory construction upon which this contention is sought to be based, namely: That general words which follow particular and specific words of the same kind or nature, take their meaning from the particular and specific words, and are generally presumed to be restricted to the same genus as those words, and as comprehending only things of the same kind as those designated by them; but it must be remembered that this rule has its proper application only in cases where there is nothing in the statute tending to show that a wider and more comprehensive meaning was intended by the use of the general words. If, therefore, said

sections 2320 and 2329, only, were to be construed, and that, independently of anything outside of them, as though standing by themselves; or, if the act as a whole contained nothing of a nature purporting to show that the general words used in said sections were intended in a larger sense than the specific words indicate; then the present case might be considered such an one as to justify the application of the rule.

The sections named, however, are not to be construed by themselves. The whole act is to be looked to, and its general purpose ascertained, in order to properly determine the meaning of its several provisions, and the different sections are to be construed as parts of one general statute. Thus looking at the act, we find its general purpose stated in section 2319 (sec. 1, act of 1872) in the broad declaration that—

"All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found, to occupation and purchase, by citizens of the United States," etc.

It is important to observe that there is no limitation or restriction as to the kind or class of mineral deposits which are thus made subject to exploration and purchase. The invitation is to explore and purchase "all valuable mineral deposits" in the public lands, and to occupy and purchase the lands in which they may be found. Broader, or more comprehensive language could hardly have been used.

Wherever mineral deposits are found in the public lands, they are declared to be free and open to exploration and purchase, with only one qualification—they must be *valuable* mineral deposits.

Then follow certain provisions for the acquisition of title from the Government to mining claims, once discovered and properly located, whether they be "upon veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits" (sec. 2320), or whether they be "claims usually called 'placers,' including all forms of deposit, excepting veins of quartz, or other rock in place" (sec. 2329).

Now, coming again to the general words "or other valuable deposits," as used in section 2329, with reference to vein or lode claims, and the words "including all forms of deposit," as used in section 2329, with reference to claims usually called "placers," and construing them in the light of the declared general purpose of the act, as a whole, as specifically indicated in sections 2318 and 2319, the conclusion seems irresistible that the general words in question, as used in both instances, depend for their meaning, not only upon the specific words which they follow, but depend also upon and draw from the larger and more comprehensive expressions—"all valuable mineral deposits," as used in section 2319, and "lands valuable for minerals," as used in section 2318. Looking, then, to both the sources stated for the guide to the meaning of the general words, the further conclusion seems equally

irresistible that in the first instance (sec. 2320) they were intended to include other valuable mineral deposits, of whatever kind, if in the form of *veins* or *lodes* of *quartz*, or other *rock in place*, while in the second (sec. 2329) they were intended to include all forms of mineral deposit, of whatever kind or nature—whether metallic or otherwise—excepting *veins* of *quartz* or other *rock in place*.

Such seems to be a fair and reasonable construction of the sections in question, and in my judgment is the only one that accords with the manifest purpose of the act as a whole, which was, as we have seen, the adoption of a general scheme or system for the development of the mineral resources of the country. The larger and more comprehensive provisions of both sections 2318 and 2319 must be given reasonable effect and operation—they can not be ignored—and the Department is not aware of any rule of construction requiring that the specific designations used in the succeeding sections shall operate to restrict or limit the meaning and effect of such larger provisions. Furthermore, if the rule of *ejusdem generis* were held to apply, and the construction contended for adopted, the result would be equivalent to saying that Congress, after having declared that "all valuable mineral deposits" in the public lands, without reservation or restriction as to kind or nature, shall be free and open to exploration and *purchase*, has provided a means for the purchase only of a certain class (the metallic) of such valuable mineral deposits. Such a construction would

reduce the statute to an absurdity. This would furnish a sufficient reason for its rejection if there were no other.

Ever since the enactment of the mining laws, however, as has been shown, the construction by the Land Department, with practical uniformity, has been the other way. The more liberal view was early adopted and has since prevailed to the extent that many titles to lands patented as mineral, though of the nonmetallic class, are now depending upon it. This view having been generally accepted for so long a time, and property rights having grown up under it, there should be, in my judgment, the clearest evidence of error, as well as very strong reasons of policy and justice controlling, before there should be a departure from it.

* * * * *

Sufficient has been said to show what has been the long-continued practice of the Land Department, and to point out the danger and harmful results of a departure from that practice at this late day. Independently of these things, however, it may be added that the construction, as an original proposition, appears to be clearly right. The Department, therefore, in concluding this branch of the case, adheres to the rule:

That whatever is recognized as a mineral by the standard authorities on the subject, whether of metallic or other substances, when the same is found in the public lands in quantity and quality sufficient to render the land more valuable on account thereof than for agricultural purposes, should be treated as coming within the purview of the mining laws.

The lands here involved being admittedly of great value for the deposits of marble they contain, and valuable only on account thereof, are clearly within the meaning of the rule thus laid down, and must therefore be held subject to entry under the mining laws, unless it be held that mineral lands of such character are not within the exceptions from the railroad and State grants in question.

This brings us to the other phase of the contention: That the determination or classification of lands as mineral within the meaning of the mining laws, does not furnish a guide for the classification of lands as mineral within the meaning of the excepting clause of the grant of July 2, 1864; in view whereof it is insisted that though lands chiefly valuable for minerals of the class other than metallic may be subject to entry in some instances under the mining laws, yet no lands but those containing the metalliferous minerals can be held to come within the meaning of the exception from said grant.

At the very threshold of the discussion of this branch of the case, we are met by the aforesaid act of July 1, 1864, passed the day before the grant to the railroad company was made, wherein it was declared that coal—a nonmetallic mineral—is within the exception of mineral lands in the preemption act of 1841, and with the case of *Mullan* v. *United States* (*supra*), holding that this was a legislative declaration to the effect that coal lands are mineral lands within the meaning of that term

as used in statutes regulating the public lands, unless a contrary intention is clearly manifest. This legislative intrepretation of the word "mines," used in the preemption act, as including nonmetallic minerals, given the day before the grant to the railroad company was made, is very significant, and would seem to negative all idea that Congress intended by the use, the next day, of the term "mineral lands," in said grant, to include thereby only lands containing the metalliferous minerals. The larger and more comprehensive meaning would seem clearly to have been intended, in the absence of anything plainly manifesting a contrary purpose.

Again, the proviso in the excepting clause of the company's grant, that the word "mineral," when used in the act, shall not be held to include *coal* and iron, clearly shows the mind of Congress on the subject. If the purpose had been to except from the grant only lands valuable for metalliferous minerals, there would have been no necessity for said proviso as to coal; and if the exception of mineral land would have included coal, as must be admitted, there is no apparent reason why the exception may not include any other fossiliferous mineral substance, if the lands containing it are chiefly valuable on that account. The contention that this would make the exception coextensive with the grant, is fully answered by the condition that in all cases the lands must be *valuable* for their minerals, which, under a long line of decisions, has been held to mean: chiefly valu-

able for minerals, or, which is the same thing, more valuable on that account than for agricultural purposes. There is nothing in the act making the grant to this company, nor in any contemporary legislation on the subject of which the Department is aware, that clearly manifests an intention on the part of Congress to restrict or limit the meaning of the term "mineral lands," as used in said grant to metalliferous minerals only. The same may be said of the grant to the State.

In the act of February 26, 1895 (28 Stat., 684), which provided for the examination and classification, in the States of Montana and Idaho, of mineral lands within the limits of the company's grant, but excepted therefrom on account of their mineral character, it was declared (section 3):

"That all lands shall be classified as mineral which, by reason of valuable mineral deposits, are open to exploration, occupation, and purchase under the provisions of the United States mining laws."

The act also contains the proviso that the word "mineral" shall not be held to include coal and iron, the same as in the original grant. Here we have what appears to be a subsequent legislative interpretation of the meaning of the exception of "mineral lands" from the company's grant. It is, in effect, that all lands which by reason of valuable mineral deposits are open to exploration, occupation, and purchase, under the provisions of the mining laws, shall be classified as "mineral lands" within the meaning of said exception—not including, of

course, coal and iron. In view of this interpretation, it seems plain that in the mind of Congress the term "mineral lands," as used in said grant, is the equivalent of the terms "lands valuable for minerals" and "all valuable mineral deposits," as used in the mining statutes. This interpretation is in entire harmony with the contemporaneous and long-continued construction by the Land Department.

The case of *Tucker* v. *Florida Railway and Navigation Company* (19 L. D., 414) is cited and relied on as holding the contrary view. In that case the Department, after referring to the exception of mineral lands from the grants made during the year 1864, and subsequently thereto, and the provision that the word "mineral" as therein used should not include coal and iron, further said:

"It would seem, therefore, that the word 'mineral' is given a limited construction, and when this fact is taken into consideration with what has been before stated on the subject of mineral legislation, it would seem that the purpose of the word 'mineral' as used in the act of June 22, 1874, *supra*, was to except from selection, on account of said act, those lands containing valuable metals, such as gold, silver, cinnabar, and copper. The word was not used in its broader sense, for the greater part of the earth contains mineral in some form, the value of which often depends upon its location, or the state of advancement of science which makes known its uses."

The selections authorized by the act of June 22, 1874, were of "lands not mineral"—prac-

tically the same exception as that contained in the Northern Pacific grant. The theory upon which the decision seems to be based is, in part at least, that the express exclusion of coal and iron from the mineral exception in the grants of 1864, and subsequent grants, is an indication that the word mineral was used by Congress in a restricted or limited, and not in its broader sense. It does not appear to me that this theory can be sustained. Indeed, it would seem that exactly the opposite view is supported by sound reasoning. The very fact that the express exclusion of coal—a nonmetallic mineral—from the exception of mineral lands, was necessary in order to exclude it, shows that the word mineral was not used in its limited sense, and that it was used in that broader sense which includes all mineral deposits of whatever kind or nature. There does not appear to be any reasonable question of the soundness of this view, and it is in exact accord with the legislative interpretation shown by the act of February 26, 1895, which was passed after the decision in the Tucker case.

The further argument that the word was not used in its broader sense for the reason that the greater part of the earth contains mineral in some form, has been already answered in the statement that under the law, in all cases, the land must not only contain mineral, but must be chiefly valuable on account of its mineral.

In view of what has been said on this point, the Department is of the opinion and decides:

That lands containing valuable mineral deposits, whether of the metalliferous or fossilifer-

ous class, of such quantity and quality as to render them subject to entry under the mining laws—that is, where they are more valuable on account of such mineral deposits than for agricultural purposes—are "mineral lands" within the meaning of that term as used in the exception from the grants to the railroad company and to the State.

The following are some of the more important cases decided by the Department since the decision in the Pacific Coast Marble Company case:

In *Alldritt* v. *Northern Pacific R. R. Co.* (25 L. D., 349) it was held that lands chiefly valuable for deposits of fire clay are subject to location and entry under the mining laws and are included within the exception of "mineral lands" from the grant to the Northern Pacific Railroad Company.

In the case of *Florida Central and Peninsular R. R. Co.* (26 L. D., 60) it was held that lands chiefly valuable for phosphate deposits are mineral lands within the intent and meaning of the laws relating to the disposal of the public domain, and as such did not pass under the grant of May 17, 1856 (11 Stat., 15), to the State of Florida, to aid in the construction of certain railroads.

In *Richter et al.* v. *State of Utah* (27 L. D., 95) guano was held to be a mineral, and lands chiefly valuable for deposits thereof to be "mineral lands" within the meaning of the mining and other laws of the United States, and therefore not subject to selection by the State of Utah under the act of July 16, 1894 (28 Stat., 109),

making a grant to the State for the use of agricultural colleges.

In *McGuiddy et al.* v. *State of California* (29 L. D., 181) it was held that lands chiefly valuable for gypsum and petroleum deposits can only be disposed of under the laws governing the sale of mineral lands, and are therefore not subject to school indemnity selection.

In the case of *Tulare Oil and Mining Company* v. *Southern Pacific R. R. Co.* (29 L. D., 269) it was held that lands chiefly valuable for deposits of asphaltum are not subject to selection as indemnity under a railroad land grant from which "mineral lands" are excepted.

In the case of *Beaudette* v. *Northern Pacific R. R. Co.* (29 L. D., 248) it was held that land valuable for deposits of sandstone, and more valuable for such deposits than for agricultural purposes, are mineral in character and must be so classified under the act of February 26, 1895 (28 Stat., 683), relating to the classification of lands within the limits of the grant to the Northern Pacific Railroad Company. In that case it was said:

> The evidence shows that the land in controversy was located as a placer mine as alleged in the protest; that it contains a very large deposit of sandstone suitable for building purposes; that a quarry has been opened thereon and is being operated; that large quantities of dimension stone are being shipped therefrom to the adjacent city of Anaconda, and that it has

been used in the erection of ten or twelve buildings in that place; that this stone will sustain a pressure of 3,125 pounds to the square inch, and that it is worth between 25 and 35 cents per cubic foot as it comes from the quarry; that the land is quite valuable on account of this deposit of sandstone, and that it is of little or no value for agricultural purposes.

In the case of *Hayden* v. *Jamison* (on review, 26 L. D., 373), it was held that sandstone is a mineral substance, and that land more valuable on account of the sandstone it contains than for agricultural purposes is mineral in character and subject to disposition under the mineral laws.

It appearing that the land in controversy is of vastly more value on account of the sandstone it contains than for agricultural purposes, it results that the classification thereof made by said commissioners is wrong, that the land, although part of an odd-numbered section within the primary limits of the grant to the Northern Pacific Railroad Company, did not pass under said grant, and that said classification can not be upheld, nor the contention of said company that it is not mineral land within the meaning of the excepting clause of said grant be sustained.

In the case of *Schrimpf et al.* v. *Northern Pacific R. R. Co. et al.* (29 L. D., 327) it was held that land principally valuable for deposits of marble and slate are mineral in character and within the meaning of the excepting clause in the grant to the Northern Pacific

Railroad Company, and therefore not subject to indemnity selection under said grant. It was said in that case:

> Marble and slate are mineral substances, and as such their existence on land in quantity and quality sufficient to render the land more valuable on that account than for agricultural purposes, makes such land mineral land within the meaning of the mineral laws, and within the meaning of the excepting clause of the grant to the Northern Pacific Railroad Company, and therefore not subject to indemnity selection on account of said grant.

In the case of *Morrill* v. *Northern Pacific R. R. Co. et al.* (30 L. D., 475) it was held that lands valuable on account of limestone deposits contained therein, and more valuable on account of such deposits than for agricultural purposes, are "mineral lands" within the meaning of the mining laws, and are therefore "mineral lands" within the meaning of the act of February 26, 1895, providing for the classification of lands within the limits of the Northern Pacific Railroad grant. In that case, after referring to the case of the *Pacific Coast Marble Company* v. *Northern Pacific R. R. Co. et al.* (*supra*), and certain other authorities, it was said:

> As early as the year 1883, in the case of *Maxwell* v. *Brierly* (10 C. L. O., 50), it was held by the Department that lands more valuable for deposits of limestone than for agricultural purposes are mineral lands and subject to disposition under the mining laws. That case was referred

to and the doctrine thereof approved in the Pacific Coast Marble Company case, *supra*.

It can not be questioned that limestone is a mineral substance, and as the testimony shows that the lands in controversy have an actual value for the deposits of limestone contained therein, and are more valuable on account of such deposits than for agricultural purposes, they fall clearly within the rule announced in the authorities cited, and are accordingly held to be mineral lands within the meaning of the United States mining laws. It follows that they are also mineral lands within the meaning of the classification act of February 26, 1895, and were improperly classed as nonmineral.

In this long line of departmental decisions, excepting only the cases of Union Oil Company (23 L. D., 222), and Tucker v. *Florida Railway and Navigation Co. (19 L. D., 414), it has been continuously and uniformly held that lands valuable for minerals, whether of the metallic or nonmetallic class, are subject to location, entry, and purchase under the provisions of the mining laws, and are also within the exception of "mineral lands" from railroad land grants. The only cases wherein the contrary proposition has been announced are the two cases just referred to, both of which were overruled within a very short time after they were rendered, and neither has ever been followed in other cases.*

The cases of Conlin v. *Kelly and Clark* v. *Ervin, while differing from the general line of decisions in that common building stone was in each held not to be mineral within the mining laws, both recognize the principle that lands containing valuable deposits of nonmetalliferous as well as*

metalliferous minerals, are subject to entry under the mining laws. The doctrine announced in these two cases as to building stone was distinctly repudiated by Congress in the passage of the act of August 4, 1892. It is perfectly clear that the passage of that act and the passage of the act of February 11, 1897, with respect to oil lands, were brought about, not because it was believed by Congress that building stone and oil deposits were not within the purview of the mining laws, but because the decisions which rendered the acts necessary were distinct departures from the former uniform rulings and adjudications of the Land Department with respect to the substances mentioned. It is submitted that the passage of these two acts, viewed in connection with the attendant circumstances, as shown by reports of the Committee on Public Lands of the House of Representatives, above referred to, furnish the strongest possible evidence that in the mind of Congress it had never been contemplated that the mining laws should be restricted in their operation to embrace only minerals of the metallic class. Decisions of the Land Department holding the contrary view date back as far as the year 1875, and have been practically uniform ever since. If it had been thought by Congress that these decisions were contrary to what was intended should be the interpretation of the mining laws, it would have been an easy matter to have enacted corrective legislation on the subject. We find no such legislation on the statute books.

In *United States* v. *Moore* (95 U. S., 760, 763) this court held:

> The construction given to a statute by those charged with the duty of executing it is always

entitled to the most respectful consideration and ought not to be overruled without cogent reasons. (*Edwards* v. *Darby*, 12 Wheat., 210; *United States* v. *The State Bank of North Carolina*, 6 Pet., 29; *United States* v. *MacDaniel*, 7 Id., 1.)

From *Brown* v. *United States* (113 U. S., 568, 571) we quote as follows:

> In *Edwards* v. *Darby* (12 Wheat., 206), it was said by this court that "in the construction of a doubtful and ambiguous law the contemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to great respect." This case is cited upon this point with approval in *Atkins* v. *Disintegrating Co.* (18 Wall., 272, 301); *Smythe* v. *Fiske* (23 Wall., 374, 382); *United States* v. *Pugh* (99 U. S., 265); and in *United States* v. *Moore* (95 U. S., 760, 763). In the case last mentioned the court said that "the construction given to a statute by those charged with the duty of executing it * * * ought not to be overruled without cogent reasons. * * * The officers concerned are usually able men and masters of the subject. Not unfrequently they are the draftsmen of the laws they are afterward called upon to interpret." And in the case of *United States* v. *Pugh*, the court said: "While, therefore, the question," the construction of the abandoned and captured property act, "is one by no means free from doubt, we are not inclined to interfere at this late day with a rule which has been acted upon by the Court of

> Claims and the Executive for so long a time." See also *United States* v. *State Bank of North Carolina* (6 Pet., 29); *United States* v. *Alexander* (12 Wall., 177); *Peabody* v. *Stark* (16 Wall., 240); and *Hahn* v. *United States* (107 U. S., 402).
>
> These authorities justify us in adhering to the construction of the law under consideration adopted by the Executive Department of the Government. * * *

In *Robertson* v. *Downing* (127 U. S., 607, 613), this court, speaking of the construction given by the Treasury Department to certain acts of Congress, said:

> This construction of the Department has been followed for many years, without any attempt of Congress to change it, and without any attempt, so far as we are advised, of any other Department of the Government to question its correctness, except in the present instance. The regulation of a Department of the Government is not, of course, to control the construction of an act of Congress when its meaning is plain. But when there has been a long acquiescence in a regulation, and by it rights of parties for many years have been determined and adjusted, it is not to be disregarded without the most cogent and persuasive reasons.

In volume 23, American and English Encyclopedia of Law, first edition, page 342, it is said, on the subject of long-continued construction of a doubtful statute, as follows:

> This rule of usage followed in the interpretation of a statute has been said to apply only to

> cases where the language is ambiguous; where it is plain and unambiguous, it is said that a practical construction in conflict with it must be corrected. But if the legislature by its inaction has long sanctioned a certain construction, language apparently unambiguous may be given by the courts such construction, especially if the usage has been public and authoritative. The construction of a statute in accordance with established practice will be especially followed by the courts in cases where departure from such construction would result in great mischief, or where property rights would be disturbed.

See also, on the same subject, *United States* v. *Graham* (110 U. S., 219); *United States* v. *Philbrick*, (120 Id., 52); *Barden* v. *Northern Pacific Railroad Company*, (154 Id., 288); and *Pennoyer* v. *McConnaughy* (140 U. S., 1, 23).

These authorities are especially applicable to the present case, and we submit should be regarded as of controlling weight in support of the construction given to the term "mineral lands" and other kindred terms used in the mining laws and in railroad and other land grants by the officers charged with the administration of those laws and grants. Especially should this be so in view of the fact that the decisions on the subject by such officers for nearly thirty years have been practically uniform, and under them property rights of immense value have been acquired, which would become wholly unsettled by a changed ruling.

We recur to the act of February 26, 1895 (28 Stat., 684), which provides for the classification of lands

within the limits of the Northern Pacific grant in the States of Idaho and Montana. In the third section of that act it is declared:

> That all said lands shall be classified as mineral which by reason of valuable mineral deposits are open to exploration, occupation, and purchase under the provisions of the United States mining laws. * * * *Provided*, That the word "mineral" where it occurs in this act shall not be held to include iron or coal.

This act was passed in full view of the long line of decisions by the Land Department in which the mining laws had been interpreted as authorizing the exploration, occupation, and purchase of lands containing valuable deposits of mica, marble, gypsum, limestone, building stone, granite, asphaltum, and many other nonmetallic substances. It is a clear legislative declaration that no lands which are subject to entry and purchase under the mining laws shall be considered as within the grant to the railroad company. The plain and unmistakable inference is that Congress held the view that no rights had passed to the railroad company under its grant which could in any wise restrict the full operation of the mining laws within the limits of the grant as those laws had been interpreted from their earliest history to the date of the act. How can it be reasonably contended, in view of this unmistakable legislative construction of the exception of "mineral lands" from the Northern Pacific grant, that such exception embraces only minerals of the metallic class?

Congress, at the time of the passage of this classification act, must be presumed to have been cognizant of the former uniform interpretation of the mining laws by the Land Department. The circumstances which led to the passage of the prior act of August 4, 1892, as to building stone, conclusively show that Congress was fully aware of such former interpretation. If it had been deemed that such interpretation was wrong Congress would not have provided for the classification as mineral of all lands which, by reason of valuable mineral deposits are subject to exploration, occupation, and purchase under the provisions of the mining laws. It seems clear that Congress accepted the interpretation of the mining laws theretofore given by the Land Department, and meant that such interpretation should be applied in the classification of lands as provided in the act. Emphasis is given to this view by the provisions (sections 5 and 6) for the determination, *by the Land Department*, of protests and other controversies relating to the character of the lands classified. All such controversies were to be determined under rules and regulations as near as practicable in conformity with the rules and practice in contests involving the mineral or nonmineral character of lands in other cases. The classification was to be approved by the Secretary of the Interior before becoming final. In the administration of the act the Land Department has applied the same rules in the determination of contests involving the mineral or nonmineral character of lands classified under it as have

been applied in the determination of like contests in other cases. *Holter et al.* v. *Northern Pacific Railroad Company*, 30 L. D., 442, 448–449.)

It is an established principle of statutory construction that the legislative branch of the Government is presumed to be cognizant of the construction given to a statute by public officers whose duty it is to execute it, and that after long continuance of such construction, without legislative dissent, courts will adopt it. In Sutherland on Statutory Construction (sec. 309) it is said:

> The practical construction given to a doubtful statute by the public officers of the State, and acted upon by the people thereof, is to be considered; it is, perhaps, decisive in case of doubt. This is similar in effect to a course of judicial decisions. The legislature is presumed to be cognizant of such construction, and after long continuance, without any legislation evincing its dissent, courts will consider themselves warranted in adopting that construction. Contemporary construction and official usage for a long period by the persons charged with the administration of the law are among the legitimate aids in the interpretation of statutes.

See also Black on Interpretation of Laws (pp. 215–216); Endlich on Interpretation of Statutes (sec. 360).

There has been no legislative dissent from the long-continued construction of the mining laws here under consideration. As before shown, the only instances of legislative interposition which have occurred have been

where Congress promptly interposed its emphatic dissent from a changed or contrary construction.

It is stated in the oral argument, in substance, that lands containing valuable deposits of stone, and chiefly valuable on account thereof, have been, with the approval of the Land Department, classified, under the act of February 26, 1895, as nonmineral lands within the meaning of the grant to this company. This, however, is a mistake, as is shown by the cases referred to, where it was held that under this act such lands should be classified as mineral lands. (*Beaudette* v. *Northern Pacific Railroad Company*, 29 L. D., 248; *Morrill* v. *Northern Pacific Railroad Company et al.*, 30 L. D., 475.) No contrary classifications have been sanctioned by the Department.

The act of July 1, 1898 (30 Stat., 597, 620), is referred to by counsel for the company. This act provides a means whereby the Northern Pacific Company may relinquish lands in contest between it and settlers and select other lands of equal area elsewhere. It contains a proviso that the company—

> shall not be bound to relinquish lands sold or contracted by it, or lands which it uses or needs for railroad purposes, or lands valuable for stone, iron, or coal.

It is contended that because of the use of the word "stone" in the proviso, the act should be considered a legislative interpretation, by implication, that lands valuable for stone were subject to the grant and passed under it. We submit that this contention can not be

sustained. It is contrary to the principle universally accepted as to grants of a public nature, such as the one here under consideration, that nothing passes by implication, and that in the clear and explicit language of the grant must be found all that is conveyed by it; that when doubt arises the grant must be construed most strictly against the grantee, the rule being in such cases that nothing passes under the grant except that which is clearly given.

In *Dubuque and Pacific R. R. Co.* v. *Litchfield* (23 How., 66, 88) it was held by this court, speaking of a grant made to the Territory of Iowa to aid in the improvement of the Des Moines River, that—

> All grants of this description are strictly construed *against* the grantees; nothing passes but what is conveyed in clear and explicit language; and, as the rights here claimed are derived entirely from the act of Congress, the donation stands on the same footing of a grant by the public to a private company, the terms of which must be plainly expressed in the statute; and, if not thus expressed, they cannot be implied.

In *Slidell* v. *Grandjean* (111 U. S., 412, 437) this court said:

> It is also a familiar rule of construction that where a statute operates as a grant of public property to an individual, or the relinquishment of a public interest, and there is a doubt as to the meaning of its terms, or as to its general purpose, that construction should be adopted which will support the claim of the Government

> rather than that of the individual. Nothing can be inferred against the State. * * *
>
> The rule has been adopted and followed by this court in many instances in the construction of statutes of this description. (*Charles River Bridge* v. *Warren Bridge*, 11 Pet., 420, 536; *Dubuque and Pacific Railroad Company* v. *Litchfield*, 23 How., 66, 88; *The Delaware Railroad Tax*, 18 Wall., 206.) The rule is a wise one; it serves to defeat any purpose concealed by the skillful use of terms, to accomplish something not apparent on the face of the act, and thus sanctions only open dealing with legislative bodies.

See, also, *Barden* v. *Central Pacific Railroad Company* (154 U. S., 288); *Leavenworth, etc., R. R. Co.* v. *United States* (92 U. S., 733, 739–740).

Again, in view of the act of February 26, 1895, containing a clear and unequivocal declaration that all lands subject to exploration and purchase under the mining laws shall be classified as mineral lands within the meaning of the grant here under consideration, and in view of the long line of decisions prior to that act, holding that lands valuable for *stone* and other non-metalliferous substances were subject to exploration and purchase under the mining laws, the use of the word "stone" in the act of 1898, we submit, can not be accepted, even independently of the authorities above cited, as of any material consequence in the decision of this case. While it may be difficult to understand why the word "stone" was used in the act, except upon the

theory that *stone* lands were considered as within the contemplation of the company's grant, it is equally difficult to understand why it was provided that the company should not be bound to relinquish lands which it had *sold* or *contracted* to sell. How could it relinquish lands which it had already disposed of? In this respect the act is equally, if not more, ambiguous than with respect to the use of the word "stone."

The Department has not considered this act as intended by Congress to be an interpretation of the company's grant. In the case of *Schrimpf et al.* v. *Northern Pacific R. R. Co. et al.* (29 L. D., 327–328), speaking of the act, the Department said:

> It does not appear how this act can affect the question presented in this case, nor why it is cited, unless to show that Congress was of opinion that "stone" lands are not embraced in the term mineral lands. A conclusion that such views were entertained by Congress does not necessarily follow from the language used in said act.

What has been said of the controlling effect of the legislative construction placed upon the company's grant by the act of February 26, 1895, by the declaration that all lands shall be classified as mineral which by reason of valuable mineral deposits are open to exploration, occupation, and purchase under the mining laws, as against any possible inference from the use of the word *stone* in the act of July 1, 1898, is applicable with equal force as against the company's contention with respect to the provision in section 2 of the

granting act giving the right and authority to take from the public lands adjacent to the line of the road "materials of earth, stone, timber, and so forth" for *purposes of construction*. We submit that this provision, applying to the even as well as the odd sections, and relating to materials for construction purposes only, can not be regarded as indicative of an intention on the part of Congress that lands chiefly valuable for deposits of stone should be carried by the grant.

The act of June 3, 1878 (20 Stat., 89), provides for the sale of certain lands valuable chiefly for timber and unfit for cultivation. It also provides that "lands chiefly valuable for stone may be sold on the same terms as timber lands." Counsel for the company contend that this act is equivalent to a declaration by Congress that the disposal of stone lands was not contemplated by the acts of 1867, 1870, and 1872—the general mining laws. In the proviso to the act it is declared that nothing therein contained shall "authorize the sale of any mining claim." Prior to its passage it had been the continuous and uniform practice of the land department to allow the location, entry, and patent of lands containing valuable deposits of *stone* under the placer mining laws. This, Congress is presumed to have known, and in view thereof the act, containing a proviso that nothing in it shall "authorize the sale of any mining claim," is rather a recognition on the part of Congress that stone lands were subject to exploration and occupation under the mining laws; else why the proviso? Surely, the act furnishes

no support to the contention by the company. Since it was passed the practice of the Department has been to allow the disposal of lands containing valuable deposits of stone under it and under the mining laws also, the priority of right being in such cases determined by the priority of the initiation of the claim. *Shepherd* v. *Bird et al.* (17 L. D., 82); *Forsythe et al.* v. *Weingart* (27 L. D., 680); *The Manners Construction Co.* v *Rees* (31 L. D., 408).

We submit that neither the act of June 3, 1878, nor the act of August 4, 1892, can be regarded as a declaration on the part of Congress that prior to the latter act lands containing valuable deposits of stone were not subject to disposal under the mining laws in relation to placer claims.

It was also stated in the oral argument, in substance, that the Land Department always allowed lands valuable for stone to be entered under the preemption law, prior to its repeal. This is a mistake. No reported decision of the Interior Department holds that lands containing valuable deposits of stone suitable for building or other purposes, and chiefly valuable on account of such deposits, may be taken under the preemption law. After the enactment of the mining laws and prior to the decision in the Conlin-Kelly case the practice was continuous and uniform to allow the disposal of lands chiefly valuable for building stone only under the mining laws. We have found no decision where that rule was departed from prior to the Conlin-Kelly case.

In the recent case of *King et al.* v. *Bradford* (31 L. D., 108) it was held that lands containing deposits of ordinary brick clay are not mineral lands within the meaning of the mining laws, though more valuable for such deposits than for agricultural purposes. This ruling is referred to by counsel for the company (p. 31 of their brief), and it is suggested that it is inconsistent with former rulings of the Department holding fire clay or kaolin to be a mineral within the meaning of the mining laws. *We submit there is no such inconsistency. The decisions of the Department on the subject of common brick clay have been uniformly to the effect that such clay is not a mineral. The distinction has been clearly drawn between the common or ordinary brick clays of the country and clays useful and valuable for the manufacture of fire brick. The latter have been always treated as mineral, while the former have never been.* No standard authority recognizes common or ordinary brick clay as mineral, while kaolin, or fire clay, is so classified. The first case involving common brick clay was that of Dunluce Placer Mine (6 L. D., 761). This was followed by the case of the Blake Placer, decided January 18, 1889 (unreported), and the later case of *Jordan* v. *Idaho Aluminum Mining and Manufacturing Company* (20 L. D., 500), and finally by the King case above referred to. The rulings in all the cases have been to the effect that clays useful only for the manufacture of common brick are not mineral within the meaning of the mining laws. In *King et al.* v. *Bradford*, the Depart-

ment, after referring to the former rulings, states the underlying principle as follows:

> The contention that the rulings above referred to are antagonistic to later decisions and that the Department has practically overruled the cases wherein they were made, is not supported by the citations in the brief of counsel, as an examination will disclose. The cases referred to are *Pacific Coast Marble Co.* v. *Northern Pacific Railroad Co.* (25 L. D., 233); *Phifer* v. *Heaton* (27 L. D., 57); and *Richter et al.* v. *State of Utah* (27 L. D., 95). In the first case it was held that lands chiefly valuable for deposits of marble are mineral in character; in the second, that lands containing a deposit of gypsum cement, and more valuable on that account than for agricultural purposes, are not subject to agricultural entry; and in the third, that lands wherein exist valuable deposits of guano are subject to entry as mineral land.
>
> The distinction between the cases containing the rulings complained of and those cited by counsel as sustaining protestants' contention, is plainly apparent. Deposits, such as marble, gypsum cement, and guano, are classed by standard authorities on mining matters as mineral. On the other hand, no standard authority has been cited, nor has any been found, which in direct terms says that ordinary brick clay is mineral, while it is a well-known fact that such clay exists generally throughout the entire country, in quantities more or less varying, and that the lands where found, as a rule, are valuable for agricultural purposes.

It should be stated in this connection that the common rock of the country, sand and gravel beds, etc., referred to in the argument by counsel, are not and never have been regarded by the Land Department as mineral substances within the meaning of the mining laws. The rule has universally been that to render lands containing mineral deposits subject to disposal under the mining laws, and to bring them within the exception of "mineral lands" from railroad and other land grants, they must be *valuable* on account of such deposits, and more *valuable* on such account than for agricultural or other purposes for which lands are commonly used. As was said in the case of *Pacific Coast Marble Company* v. *Northern Pacific Railroad Company* (*supra*):

> The value of the mineral deposit, rather than its kind, appears to have been the controlling factor in determining whether the lands containing it were subject to entry and patent under the mining law.

The argument indulged in to some extent, that the term "mineral lands," as used in the exception from the grant to this company, can not be considered in its broader sense, for the reason that the greater part of the earth contains mineral in some form, and that to so construe the term would in effect destroy the grant, finds its answer in the fact that the criterion of value is always applied in determining whether lands are mineral in character. To be classified as mineral, the lands must contain valuable mineral deposits, and they must be chiefly valuable on account of such deposits. These two elements have always been

regarded as essential. Where either is wanting, the lands can not be classed as mineral lands. There is nothing, therefore, in the suggestion that should the court hold that the deposit of granite in the lands here in question is a mineral within the meaning of the exception from the company's grant, the barren rocks of the mountains would also be excepted from the grant, and the company would receive in lieu thereof valuable agricultural lands. Upon this question the officers of the Land Department are charged with the duty of safeguarding the best interests of the Government and the solicitude of counsel for the railroad company is somewhat gratuitous. The railroad company may rightfully be regarded as taking a position in this suit which is in keeping with and not antagonistic to its pecuniary interests.

If the land involved in this case is of less value, notwithstanding the deposit of granite contained therein, than agricultural land, why the contention by the company, as against the claim of the Government, that the land passed to it under its grant?

The criterion of *value* has also been recognized by this court as the means of determining whether lands containing mineral deposits are within the meaning of the mining laws. Speaking on this subject, in *Deffeback* v. *Hawke* (115 U. S., 392, 404), this court said:

> We say "land known at the time to be *valuable* for its minerals," as there are vast tracts of public land in which minerals of different kinds are found, but not in such quantity as to justify expenditures in the effort to extract them. It is not to such lands that the term "mineral" in

> the sense of the statute is applicable. In the first section of the act of 1866 no designation is given of the character of mineral lands which are free and open to exploration. But in the act of 1872, which repealed that section and reenacted one of broader import, it is "*valuable* mineral deposits" which are declared to be free and open to exploration and purchase. The same term is carried into the Revised Statutes. It is there enacted that "lands *valuable* for minerals" shall be reserved from sale, except as otherwise expressly directed, and that "valuable mineral deposits" in lands belonging to the United States shall be free and open to exploration and purchase.

See also the case of *Davis's Administrator* v. *Weibold* (139 U. S., 507, 517–518).

Sections 2319, 2320, and 2329, Revised Statutes, all use the word "deposit." This word, when applied to mining, is defined by Webster to be "a natural occurrence of a useful mineral under conditions to invite exploitation." Granite, petroleum, mica, asphaltum, and other nonmetallic minerals are easily within this description, especially since section 2329, by employing the phrase "including all forms of deposit," shows a clear purpose to use the word in a broad and liberal sense.

As early as November 23, 1882 (*Montague* v. *Dobbs*, 9 Copp's Land Owner, p. 165), it was stated and held as follows:

> The common understanding of the term "placer" is deposits of débris or wash here and

> there upon the earth's surface, *valuable* as a "placer" deposit because carrying gold; but Congress has enlarged upon the common understanding of the term, and included all deposits, excepting quartz or other rock in place. Section 2329 provides: "Claims usually called 'placers,' including all forms of deposit, with the exception just mentioned, shall be subject to entry and patent, under like circumstances, conditions, and proceedings as are provided for vein or lode claims."

This broad signification given to section 2329, which was early adopted by the Land Department, has been continuously applied ever since. Immense property interests have grown up under it. To restrict the construction at this late day to embrace only deposits of the character within the technical meaning of the term "placer"—in other words, to embrace only gold deposits other than those in rock in place—would not only be contrary to the accepted and uniform construction for nearly thirty years, acquiesced in by Congress, and especially ratified and adopted with respect to the Northern Pacific grant by the act of February 26, 1895, but would be unspeakably disastrous in its results.

We refer to certain decisions of the courts bearing upon the question.

In the case of *Gird et al.* v. *California Oil Company* (60 Fed. Rep., 531–532), it was said:

> The premises in controversy are oil-bearing lands, the Government title to which under existing laws, can only be acquired pursuant to

> the provisions of the mining laws relating to placer claims.

This case was decided prior to the passage of the petroleum act of February 11, 1897.

In *Freezer et al.* v. *Sweeney*, decided by the supreme court of Montana February 2, 1889 (21 Pac. Rep., 20), the question was whether lands containing a valuable *stone quarry* were subject to location and purchase under the placer mining laws. The answer was in the affirmative. In the course of its decision, the court said:

> The question is an interesting one, and we have not been referred to, nor have we found, any direct adjudication on the subject; but the Commissioner of the Land Office, in the case of *Montague* v. *Dobbs* (9 Copp. Land Owner, 165), and also in the application made for a patent by P. H. Bennett, reported in 3 Pub. Land Laws, 116, held that land containing layers or deposits of kaoline, and quarries of stone valuable for building purposes, could be located as placer claims under the provisions of section 2329 of the Revised Statutes of the United States. * * * This section extends and enlarges the signification commonly given to "placer claims," and makes such locations include all forms of deposit, excepting quartz veins or other rocks in place. The officers of the land department have construed it as embracing quarries of rock valuable for building purposes, as already stated, and we do not doubt the correctness of this construction.

The case of *Wheeler et al.* v. *Smith*, decided by the supreme court of Washington, February 8, 1893 (32 Pac. Rep., 784), involved the question whether land containing a deposit of limestone could be located and held as a placer mining claim, and it was held it could not. It was there said by the court:

> In our judgment, a mining claim, whether lode or placer, is not established or entitled to be patented under the mineral laws of the United States unless it contains some of the metals for which mining works are prosecuted.

This is the only case where a court in any of the public-land States has announced such a proposition, so far as the reported cases show. In speaking of the case, Mr. Lindley, in his work on Mines (vol. 1, sec. 97, p. 114), after having stated that the current of American authority and the decisions of the Land Department were to the effect that the word "mineral," as used in the various acts of Congress in connection with the public lands, should be understood in its widest signification, said:

> We regret that this last-suggested rule is in conflict with the decision of the supreme court of the State of Washington (in the case of *Wheeler* v. *Smith*), wherein that court seeks to limit the meaning of the term "mineral," as used in the Congressional mining laws, to *metallic* substances. In so doing the court treats the rulings of the land department as possessing no force or virtue, and refuses to adopt the reasoning and conclusions reached in a parallel case by the supreme court of Montana, a court noted

> for its experience and ability in dealing specially with mining questions and controversies arising out of the mining laws. This decision of the supreme court of Washington also conflicts with a number of carefully considered American cases, which will be noted when we come to enumerate the various substances which have been held to be within the reasonable definition of the term "mineral."

It is to be observed that the supreme court of Washington, in the case of *Johnson* v. *Harrington* (31 Pac. Rep., 316), decided less than six months prior to *Wheeler* v. *Smith*, held exactly to the contrary of the views expressed in the latter case. The court there said:

> That stone is a mineral will hardly be disputed. (See Copp, U. S. Min. Dec., 2d ed., p. 510.) It has been recognized as such by the duly authorized department of the Government; and entries of land containing valuable deposits of building stone or limestone are permitted as "placer claims," under sections 2319 and 2329 of the Revised Statutes of the United States, which relate to the entry and patent of mining claims. (See 3 Dec. Dep. Int., p. 116; 1 Dec. Dep. Int., p. 560.)

In the case of *Johnstone and others* v. *Crompton Co., Lim.* (English Law Jour. Rpts., 1899, vol. 68, p. 559), it was held that an exception or reservation of "mines and minerals," contained in a lease of lands, includes all substances otherwise falling under the definition of minerals which have a use and value of their own,

either for the purpose of sale or for other purposes, independently of and separably from the use of the rest of the soil. In that case, among other things, it was said:

> I understand the rule to be this: You inquire what the substances are; then you see whether these are minerals, in the sense that they belong to a class of substances, or form a class or kind of substance of which it can be said that that substance is a valuable article, either for the purpose of sale or for other purposes.

In the case of *Armstrong* v. *Granite Company* (147 N. Y., 495) the question was whether granite is a mineral within the meaning of a reservation of "minerals and ores" used in a deed of conveyance. In the decision by the court of appeals of the State of New York it was stated and held:

> The question of what are minerals within a grant or reservation of mines and minerals has been frequently considered by the English courts, and the almost uniform conclusion has been that the word includes not only metals and metal-bearing rock, but anything in character which can be got by mining. In one of the cases (*Earl of Rosse* v. *Wainman*, 14 M. and W., 859), which was affirmed (2 Exch, 800), the question arose under a reservation to the lord of the manor, in an inclosure act, of "all mines and minerals" lying within or under the common or waste lands, inclosed by the act, and it was held that beds of building stone

were within the reservation. Parke, B., in his opinion, said: "The term 'minerals' here used, though more frequently applied to substances containing metals, in its proper sense includes all fossil bodies or matters dug out of mines." In *Bell* v. *Wilson* (1 Ch. App., 303), under a conveyance of land reserving to the grantor "all mines or seams of coal and other mines, metals, or minerals," it was held that the reservation included freestone. *Hext* v. *Gill* (L. R., 7 Ch. App., 699) is an important case on the subject, because Mellish, L. J., in his opinion formulates as the result of the adjudged cases the principle upon which the cases proceed, and which has been followed and applied in several subsequent cases. That was a case of a reservation in a private grant by the lord of a manor of "all mines and minerals within or under the premises," and the question was whether beds of china clay, the product of disintegration of granite, not known to exist in the land at the time of the grant, were embraced within the reservation, and the court decided that they were. Mellish, L. J., said: "The result of the authorities, without going through them, appears to be this, that a reservation of 'minerals' includes every substance that can be got from underneath the surface of the earth, for the purpose of profit, unless there is something in the context or in the nature of the transaction to induce the court to give it a more limited meaning." The same principle was expressed in another form by Bowen, L. J., in the case of *Earl of Jersey* v. *Guardians*, etc. (L. R., 22 Q. B. Div., 555),

following the case of *Hext* v. *Gill* (*supra*) in which he said that the word applies to all substances of a mineral nature which have "a use or value of their own, independent of their being constituents of the soil."

* * * * *

Lord Romilly, in *Midland Railway Co.* v. *Checkley* (L. R., 4 Eq. Cas., 19), construing a reservation in an act for the compulsory taking of land for canals, of "all mines and minerals within and under the land," in which the question was whether the right to quarry paving stones was reserved, said: "Stone is, in my opinion, clearly a mineral, and, in fact, everything except the mere surface which is used for agricultural purposes; anything beyond that which is useful for any purpose whatever, whether it is granite, marble, fire clay or the like, comes within the word mineral, when there is a reservation of the mines and minerals from a grant of land. Every species of stone, whether marble, limestone, or ironstone, comes, in my opinion, in the same category." We shall refer only to another English case, the latest on the subject (*Attorney-General* v. *Welsh Granite Co.*, 35 Week. Rep., 617), decided in 1887, which held that granite was a mineral within a reservation of "mines and minerals."

* * * * *

Upon the authorities we think we should not be justified in holding that granite was not embraced in a reservation or grant of "minerals" in the absence of qualification. It is no doubt true that this word in its more common

application in a grant of "minerals" would be deemed to refer to metallic substances. This perhaps grows out of the fact that mining is to a great extent prosecuted for the purpose of obtaining gold, silver, iron, and other metals, and grants of "minerals" or reservations thereof in conveyances of public lands are most frequently made with reference to mineral-bearing ores or deposits. But it would be an unwarrantable limitation of such a grant or reservation to exclude from its operation beds of coal or other nonmetallic mineral deposits of commercial value, or to confine it to such minerals as were known or supposed to be on the premises at the time. The grant or reservation of minerals in a deed contemplates substances to be severed and taken away from the premises, and it is difficult to suppose that the parties to such a deed intended to exclude from the grant any description of valuable mineral which would come within the legal meaning of the word, which might thereafter be discovered. We are of opinion, therefore, that the words "minerals and ores" in the grant of 1871, standing alone, would include the granite upon the premises.

The case of *Brady* v. *Brady et al.* (31 Misc. Rep., 411, 65 N. Y. Supp., 621), involved the question whether limestone or granite ledges were within the meaning of an exception of "all mines and minerals" from a deed of conveyance. It was there held:

> The 20 acres in question are largely covered with limestone or granite ledges, rising above the natural surface of the ground. There is, it

is true, some timber and some tillable land, but probably the chief value of the property consists in this stone. To obtain this mineral a quarry has been opened.

* * * * *

Under the La Farge deed, the ownership of the limestone and granite upon the 20 acres in question, and the right to enter, dig for, and carry away the same, remained in the grantor, and passed to his children under his will (*Armstrong* v. *Granite Co.*, 147 N. Y., 495, 42 N. E., 186; *Hext* v. *Gill*, 7 Ch. App., 699). The material, clearly, is a mineral, and it is reserved from the grant unless "the nature and context of the deed show that it was not intended to be included" in the reservation. There is nothing to justify such a finding.

The two cases last mentioned were cited with approval in the case of *Phelps* v. *Church of Our Lady, etc.*, decided by the circuit court of appeals for the third circuit (115 Fed. Rep., 882), wherein *marble* was held to be a mineral within the meaning of an exception of "mines and minerals" from a conveyance of land.

See also *Hartwell* v. *Camman* (10 N. J. Eq., 128), wherein "paint stone" was held to be a mineral within the meaning of an exception of "mines and minerals" contained in a deed of conveyance.

In the case of *Gill* v. *Weston* (110 Pa. St. Rep., 312, 317), the question whether petroleum is a mineral within the meaning of a certain act of the State legis-

lature, passed April 27, 1855, was involved. The court said:

> It matters not that the act of 1855 was passed before petroleum was discovered. It is a mineral substance obtained from the earth by a process of mining, and lands from which it is obtained may with propriety be called mining lands.

This case, in effect, though not in express terms, overruled the case of *Dunham* v. *Fitzpatrick* (101 Pa. St., 36), cited by counsel for the company. See also *Westmoreland Gas Company* v. *De Witt* (130 Pa. St., 235); *Hague et al.* v. *Wheeler et al.* (157 Id., 324, 341).

In the case of *Buffalo Natural Gas Fuel Company* (73 Fed. Rep., 191) natural gas was held to be "a crude mineral."

In the recent case of *Ruttledge* v. *Cress* (17 Pa. Superior Ct., 490) it was held that an act of the legislature, passed May 8, 1876, imposing damages upon any person mining or digging out "any coal, iron or other minerals, knowing them to be upon the land of another," applies to the act of digging and carrying away *building stone* from an open quarry on the surface of the ground.

Bainbridge, in his work on "The Law of Mines and Minerals" (pp. 1 and 2), gives the following definition of the term "mineral:"

> A mineral has been defined to be a fossil, or what is dug out of the earth. The term may, however, in the most enlarged sense, be described as comprising all the substances which

> now form, or which once formed, part of the solid body of the earth, both external and internal, and which are now destitute of and incapable of supporting animal or vegetable life. In this view, it will embrace as well the bare granite of the high mountain as the deepest hidden diamonds and metallic ores.

In the work of Barringer and Adams on the Law of Mines and Mining in the United States, page lxxvi, "mineral," in its general legal sense is defined to be:

> Any valuable inert or lifeless substance formed or deposited in its present position through natural agencies alone, and which is found either in or upon the soil of the earth or in the rocks beneath the soil.

We submit a few observations upon the cases cited by counsel for the company, pages 34–37 of their brief.

Dunham v. *Kirkpatrick* (101 Pa. St., 36): This case, as already stated, was, in effect, overruled in the more recent case of *Gill* v. *Weston* (110 Pa. St, *supra*).

The same may be said with respect to the case of *Gibson* v. *Tyson* (5 Watts, 34), in so far as that case is relied upon as having announced the principle that only metallic substances are properly within the meaning of the term "mineral."

In *Alfred* v. *Barnum* (45 Cal., 482) it was held that the mere fact that land contains particles of gold or veins of gold-bearing rock does not necessarily impress it with the character of "mineral land" within the meaning of the Pacific grants of July 1, 1862, and July 2, 1864; that to be so classed the land must at

least be shown to contain quantities of mineral sufficiently valuable to render it available and valuable for mining purposes. We do not see that this case furnishes any authority against the principle we contend for.

To the same effect is the case of *Merrill* v. *Dixon* (15 Nevada, 401, 407). It was there said:

> In excluding mineral lands, Congress only intended to exclude lands *valuable* for mining purposes. It is only *valuable* mineral lands and deposits that are reserved from sale, except as provided by law, in respect to mineral lands. (See U. S. Rev. Stat., 2318, 2319.)

The case of *Overman Silver Mining Company* v. *Corcoran* (15 Nevada, 147) can not be considered as more than a holding to the effect that no valid location of a mining claim can be made under the provision of the mining laws relating to lode claims until discovery of a vein or lode within the limits of the location—a proposition we do not dispute.

McKeon v. *Bisbee* (9 Cali., 137), does not make the ruling stated by counsel. The quotation given in the brief is taken from the argument in the case, and not from the opinion.

In the case of *Stevens* v. *Williams* (1 McCreary), a vein, lode, or ledge, within the meaning of the mining laws, was held to be "a mineral body of rock within defined boundaries in the general mass of the mountain." This can have no bearing upon the question as to the meaning of the language, "including all forms of

deposit, excepting veins of quartz, or other rock in place," used in section 2329. Neither can the case of *Stevens* v. *Gill* (1 Morrison's Mining Reports, 579), wherein what constitutes a lode or vein under section 2319 was stated.

In *Eureka, etc., Company* v. *Richmond Mining Company* (4 Sawyer, 302) it was held that—

> The terms "veins" and "lodes" as used by miners and in the mining acts of Congress are applicable to any zone or belt of mineralized rock lying within boundaries clearly separating it from the neighboring rock.

To the same general effect are the cases of *Reynolds* v. *Iron Silver Mining Company* (116 U. S. 695); *Richmond Mining Company* v. *Eureka Mining Company* (103 id., 839); *Jupiter Mining Company* v. *Bodie Company* (7 Sawyer, 96).

Both the English and American authorities, with practical unanimity, agree that the word "mineral" in its legal and generally accepted sense, as used in legislative land grants and in deeds of conveyance by individuals, embraces nonmetallic as well as metallic substances. The authorities also agree with like unanimity that *marble*, *limestone*, *granite*, *building stone*, *sandstone*, etc., are minerals. There can be no question that these substances are regarded as minerals by the most approved text writers and also by the highest judicial tribunals both in England and America.

In the administration of the mining laws, as has been shown, the Land Department early adopted the rule

that whatever is recognized as a mineral by the standard authorities on the subject, whether metallic or non-metallic, where found in quantity and quality sufficient to render it valuable and to render the lands containing it more valuable on that account than for agricultural or other purposes for which lands are ordinarily used, should be treated as within the purview of those laws. This rule has been followed from the time of its adoption to the present day. The land here in question is within the rule. It is admitted to be *valuable*, and *chiefly valuable*, for the deposit of granite or building stone contained therein. It was located and has been entered and patented as "mineral land" under the mining laws in accordance with the long-established practice. Many thousands of acres of land of like character have been entered and patented in the same manner.

The mining laws were enacted, codified, and incorporated in the Revised Statutes before any rights had attached or become vested under the Northern Pacific grant. These laws provided that *all lands valuable for minerals* should be reserved from sale except as therein directed; and declared that *all valuable mineral deposits* in lands belonging to the United States should be free and open to exploration and purchase in the manner therein provided.

The grant to this company expressly excluded "all mineral lands," excepting coal and iron, from its operation. The joint resolution of July 30, 1865, adopted by the same Congress that made the grant, declared

that it shall not "be so construed as to embrace mineral lands, which in *all cases* are reserved exclusively to the United States." The mining laws from their earliest history have been administered by the Land Department as applicable in all their force and effect to the public mineral lands within the limits of the grant. (*Central Pacific R. R. Co.* v. *Valentine*, 11 L. D., 238.) This practice has been sustained by this court. (*Barden* v. *Northern Pacific R. R. Co.*, 154 U. S., 288.)

The provision in the act of July 26, 1895, that lands should be classified as mineral within the meaning of this grant, which by reason of valuable mineral deposits were open to exploration, occupation, and purchase under the provisions of the mining laws, was a recognition by Congress of the principle which had theretofore obtained in the administration of those laws with respect to their applicability to lands containing valuable deposits of *marble*, *limestone*, *granite*, and *building stone*. This practice was also sanctioned, as we have shown, by the act of August 4, 1892, when considered in the light of the circumstances which led to its passage.

We submit that the land in question is *mineral land* and did not pass to the company under its grant.

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Clerk.

In the Supreme Court of the United States.

OCTOBER TERM, 1902.

NORTHERN PACIFIC RAILWAY COMPANY, appellant,
v.
J. A. SODERBERG, APPELLEE.

No. 61.

SUPPLEMENTAL BRIEF ON BEHALF OF THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1902.

NORTHERN PACIFIC RAILWAY COMPANY, appellant,
v.
J. A. SODERBERG, APPELLEE. } No. 61.

SUPPLEMENTAL BRIEF ON BEHALF OF THE UNITED STATES.

Since this case was argued, and since the briefs of counsel were filed, there has come from the press an extended work on the subject of mines and mining claims, by Wilson I. Snyder, of the Utah bar. The principles announced in this work, in so far as applicable to the question of law involved in this case, sustain the contention of counsel for the Government.

The attention of the court is specially called to volume 1, section 143, wherein the author, among other things, says:

> The term "minerals," standing alone, and as understood in mining law, generally compre-

> hends and includes all the substances in the earth's crust which are sought for and removed by man for the substance itself. In the early decisions in England there seems to have been a disposition to use, in grants and reservations of the right to mine minerals, the comprehensive and general expression, "all mines and minerals." As was said by Baron Parke in a leading case, "The term 'minerals' here used, though more frequently applied to substances containing metals, in its proper sense includes all fossil bodies or matters dug out of mines; and Dr. Johnson says that 'all metals are minerals, but all minerals are not metals;' and mines, according to Jacobs's Law Dictionary, are 'quarries or places where anything is digged;' and in the Yearbook, 17 Edw. III, chapter 7, '*Mineræ d'Pierre*' and '*De Charbon*' are spoken of. Beds of stone, which may be dug by winning or qarrying, are therefore properly minerals, and so we think they must be held to be in the clause in question." This definition has been practically followed in England in a greater number of cases.

On the same subject the court's attention is also called to sections 134, 140, 144, 145, and 148 of the same volume, and to section 926 of volume 2 of said work.

On the question of the meaning of section 2329 of the Revised Statutes, providing for the location, entry, and patent of "claims usually called 'placers,' including all forms of deposit excepting veins of quartz or

other rock in place," the attention of the court is called to sections 307 to 314, inclusive, of volume 1.

Respectfully submitted.

WILLIS VAN DEVANTER,
Assistant Attorney-General.
ARTHUR B. PUGH,
Assistant Attorney.

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Supreme Court of the United States.

No. 61.—October Term, 1902.

The Northern Pacific Railway Company, Appellant, vs. John A. Soderberg.	Appeal from the United States Circuit Court of Appeals for the Ninth Circuit.

[February 23, 1903.]

This was a bill filed by the Railway Company in the Circuit Court for the District of Washington to enjoin the defendant Soderberg from taking, removing or disposing of granite from a quarter section of land of which he had taken possession under a mineral location, and for an account of the granite quarried or removed.

The bill alleged the incorporation of the Northern Pacific Rail*road* Company under an act of Congress of July 2, 1864, with power to construct a railroad from Lake Superior to Puget Sound, with a branch line via Columbia River to Portland; the grant of every alternate odd-numbered section of public land, *not mineral*, to the amount of twenty alternate sections per mile, on each side of the line when passing through the territories; acceptance of the act by the Railroad Company; a joint resolution of Congress approved May 31, 1870, authorizing the company to issue bonds for the construction of the road, with a privilege to the company of building its main road by the valley of the Columbia River, with a branch across the Cascade Mountains to Puget Sound; the definite location on March 26, 1884, of the Cascade branch of the road; the completion and acceptance of the road coterminus with its public lands; the conveyance on August 3, 1896, of all its property to the Northern Pacific Rail*way* Company, which has since continuously operated such road.

The bill further alleged that the quarter section in dispute was rough, mountainous land, the principal value of which consisted in the existence of a ledge of granite of good merchantable quality, and valuable for building stone; that the defendant in 1898 entered upon this quarter section and began to quarry, remove and dispose of such granite under a mineral location of the land in question, contending that such land is excepted from the general land grant, and that the question whether this land is mineral or non-mineral has not yet been determined by the department. Wherefore an injunction was prayed.

The answer raised no issue of fact, but averred that the lands were mineral in character and as such excepted from the grant, and that defendant having complied with the rules and regulations of the Land Depart-

ment and made the proper proof, it was assumed and decided that the defendant was entitled to a patent. That he paid the proper fees to the receiver, who forwarded the proofs and records to the Land Department with a recommendation that a patent issue. The patent, however, does not seem to have been actually issued until after the beginning of this suit.

The court heard the case upon a stipulation of facts and entered a decree dismissing the bill, and quieting the title of the defendant to the lands in question. (99 Fed. Rep. 506.) On appeal to the Circuit Court of Appeals this decree was affirmed. (104 Fed. Rep. 425.)

Mr. Justice BROWN delivered the opinion of the Court.

Motion was made to dismiss this appeal for the reason that, as the jurisdiction of the Circuit Court was invoked upon the ground of diverse citizenship, the decree of the Circuit Court of Appeals is final, under section 6 of the Court of Appeals act of 1891, as interpreted by the decisions of this court in *Colorado Central Mining Co.* v. *Turck*, (150 U. S. 138;) *Borgmeyer* v. *Idler*, (159 U. S. 408,) and *Press Publishing Co.* v. *Monroe*, (164 U. S. 105.) But, to impress the attribute of finality upon a judgment of the Circuit Court of Appeals, it must appear that the original jurisdiction of the Circuit Court was dependent "entirely" upon diverse citizenship. That is not the case here. Plaintiff's bill does indeed set up a diversity of citizenship as one ground of jurisdiction, but as it appears that its title rests upon a proper interpretation of the land grant act of 1864 as to the exception of non-mineral lands, there is another ground wholly independent of citizenship under that clause of section 1 of the act of 1888 (25 Stat. 433) clothing the Circuit Court with jurisdiction of all civil suits involving over $2,000, "and arising under the Constitution or laws of the United States." If the case made by the plaintiff be one which depends upon the proper construction of an act of Congress, with the contingency of being sustained by one construction and defeated by another, it is one arising under the laws of the United States. (*Doolan* v. *Carr*, 125 U. S. 618; *Cooke* v. *Avery*, 147 U. S. 375.) Under the allegations of the bill the fact that the Land Department had not determined whether the land in question was mineral or non-mineral, does not involve a question of fact, as the facts are admitted, but solely a question of law whether land valuable for its granite is mineral or non-mineral under the terms of the grant. (*Morton* v. *Nebraska*, 21 Wall. 660.) The fact that a patent issued pending suit is neither set up in the pleadings nor noticed in the opinion of either court. The motion to dismiss must therefore be denied.

2. We are thus brought to the main question in the case, viz: Whether lands valuable solely or chiefly for granite quarries are mineral lands within the exception of the grant of 1864? The third section of the act

containing the granting clause of land "not mineral" also contains the following provisos: "*Provided further*, That all mineral lands be, and the same are hereby, excluded from the operations of this act. . . . *And provided, further*, That the word 'mineral' when it occurs in this act shall not be held to include iron or coal." The inference from this proviso is that in the absence of a special provision both iron and coal would be considered as minerals, and thus to repel the idea that only metals were included in the word mineral. This inference is strengthened by the fact that the day before this act was passed, July 1, 1864, (13 Stat. 343,) another act was approved authorizing the public sale to the highest bidder of "any tracts embracing coal beds or coal fields," and providing that any lands not thus disposed of shall thereafter be liable to private entry. Relying largely upon this act as a "legislative declaration" this court held in *Mullan* v. *United States*, (118 U. S. 271,) that coal lands are mineral lands within the meaning of that term as used in the statutes regulating the disposition of the public domain. This effectually disposes of the argument that the word "mineral" must be construed as synonymous with metalliferous.

Upon the other hand, section 2 declares that "the right, power and authority is hereby given to said corporation to take from the public lands, adjacent to the line of said road, material of earth, stone, timber, &c., for the construction thereof." There is a possible inference from this that stone was not be regarded as mineral, although it is more likely that a grant was intended of all material serviceable in the construction of the road, even though it might otherwise be excepted from the grant as a mineral. Taking these two sections together, it would seem that the reason for providing in the third section that iron and coal lands should not be deemed mineral was the same as the liberty given by the second section to take materials of earth, stone and timber, namely, to facilitate the construction and operation of the railroad, in which large quantities of coal and iron would be required.

The word "mineral" is used in so many senses, dependent upon the context, that the ordinary definitions of the dictionary throw but little light upon its signification in a given case. Thus the scientific division of all matter into the animal, vegetable or mineral kingdom would be absurd as applied to a grant of lands, since all lands belong to the mineral kingdom, and therefore could not be excepted from the grant without being destructive of it. Upon the other hand, a definition which would confine it to the precious metals, gold and silver, would so limit its application as to destroy at once half the value of the exception. Equally subversive of the grant would be the definition of minerals found in the Century Dictionary: As "any constituent of the earth's crust;" and that of Bainbridge on Mines: "All the substances that now form, or which once formed, a part of the solid body of the earth." Nor do we approximate much more

closely to the meaning of the word by treating minerals as substances which are "mined," as distinguished from those which are "quarried," since many valuable deposits of gold, copper, iron and coal lie upon or near the surface of the earth, and some of the most valuable building stone, such, for instance, as the Caen stone in France, is excavated from mines running far beneath the surface. This distinction between underground mines and open workings was expressly repudiated in *Midland Rwy. Co.* v. *Haunchwood Co.*, (L. R. 20 Ch. Div. 552,) and in *Hext* v. *Gill*, (L. R. 7 Ch. App. 699.)

The ordinance of May 20, 1785, authorizing the sale of lands in the western territory, with a reservation of "one-third part of all gold, silver, lead and copper mines, to be sold or otherwise disposed of, as Congress shall hereafter direct," was evidently intended as an assertion of the right of the government to a royalty upon the more valuable metals—a prerogative which had belonged to the English Crown for centuries, though there confined to gold and silver, which were only considered as royal metals, and having its origin in the king's prerogative of coinage. (1 Black. Com. 394.) While intrinsically the precious metals are the more valuable, in the aggregate, the non-precious metals have probably contributed as much or more to the general wealth of the country.

A division of lands into agricultural and mineral would also be a most uncertain guide to a proper construction of the word "mineral," since most of the lands included in the limits of this grant are neither one nor the other, but desert or rocky land, of no present value for agriculture, and of little value for their mineral deposits. So, too, the general reservations in the earlier acts of Congress of lead mines and saline springs seem to have been dictated by the fact that those were the only valuable minerals known to exist in the States to which the acts were applied, while in Michigan and Wisconsin there was a similar reservation of copper, lead and other valuable ores, which were just then being discovered and made available. In the earlier grants of Congress in aid of railroads there was generally no reservation of mineral lands, but in the grants subsequent to 1860, to the Lake Superior and Pacific roads, through unsurveyed and almost unknown territories, a reservation was invariably made of lands suspected of being rich in metals. It is quite true that, had it not been for the actual or suspected presence of these metals, Congress might not have deemed it worth while to reserve the non-metalic mineral lands; but when its attention was called to the fact that valuable mines might exist along the line of these roads, as it appears to have been about 1860, its policy was changed, and not only metalliferous but all mineral lands were reserved. Subsequent to that, it was only in States which had already received grants without reservation, or in known agricultural States, that such grants continued to be made.

Considerable light is thrown upon the Congressional definition of the word "minerals" by the acts subsequent to the Northern Pacific grant of

1864, and prior to the definite location of the line in 1884. The first of these acts, that of July 26, 1866, (14 Stat. 251,) declares that the "mineral lands" of the public domain shall be free and open to exploration and occupation, subject to such rules as may be prescribed by law, and subject also to the local customs or rules of miners in the several mining districts. The second section provides that whenever any person, or association of persons claim a vein or lode of quartz, or other rock in place, bearing gold, silver, cinnabar or copper, he shall be entitled to enter such tract and receive a patent therefor, upon complying with certain preliminaries, and with a right to follow such vein, &c., into adjoining lands. The argument made in this connection by the Railway Company would confine the term "mineral lands" to lands bearing gold, silver, cinnabar or copper, which would exclude all other metalliferous lands, such as contain iron, lead, tin, nickel, platinum, aluminum, &c.—a limitation wholly inconsistent with the use of the word "mineral" in the first section.

This act was amended July 9, 1870, (16 Stat. 217,) to allow the entry of "placer" claims, "including all forms of deposits, excepting veins of quartz, or other rock in place," and declaring that they shall be subject to patent under the same provisions as vein or lode claims. As placers are merely superficial deposits, occupying the beds of ancient rivers or valleys, washed down from some vein or lode, (*United States* v. *Iron Silver Mining Co.*, 128 U. S. 673,) this act has little bearing upon the present case, though in *Freeser* v. *Sweeney*, (21 Pac. Rep. 20,) it was held by the Supreme Court of Montana to authorize the locating and patenting of a stone quarry.

Another act having a more important bearing is that of May 10, 1872, (17 Stat. 90,) "to promote the development of the mining resources of the United States," and providing in the first section that "all valuable mineral deposits" in public lands should be open to exploration and purchase, according to the local customs or rules of miners. This section is an obvious extension of section 1 of the act of 1866, above cited, by substituting the words "valuable mineral deposits in lands" for the words "mineral lands," as used in the prior act. The second section is also in line with the second section of the act of 1866, and provides that "mining claims upon veins or lodes of quartz, or other rock in place bearing gold, silver, cinnabar, lead, tin, copper or other valuable deposits heretofore located, shall be governed as to length along the vein or lode by the customs, regulations and laws in force at the date of their location." This section, like section 2 of the act of 1866, is susceptible of two interpretations, either that the words "valuable mineral deposits" of the first section are limited to the particular metals described in the second section, or that those metals stood in particular need of regulation as to the length and breadth of vein, and power to pursue such veins downward vertically, and even beyond the vertical side lines of the locations. This appears to us the more reasonable

interpretation. The fact that no such limits were imposed on veins of coal or other minerals or metals indicates, not that the act was intended to be confined to the minerals enumerated in section 2, since that would be a clear restriction upon the words "valuable mineral deposits" in the first section, but that these particular metals stood in special need of limitation and protection.

Equally pregnant with meaning is the act of June 3, 1878, (20 Stat. 89,) for the sale of timber lands in California, Oregon, Nevada and Washington, which provides that "lands valuable chiefly for timber, but unfit for cultivation," as well as lands "valuable chiefly for stone," may be sold in quantities not exceeding 160 acres, with a proviso excluding mining claims, or lands containing gold, silver, cinnabar or coal. This was followed by another act, August 4, 1892, (27 Stat. 348,) authorizing the entry of lands "chiefly valuable for building stone," under the placer mining laws, and extending the previous act to all public land States. This act was passed after the line of the road had been definitely located, and consequently has no direct bearing upon the case, and can only be regarded as explaining to some extent the previous reservation of all lands valuable for mineral deposits.

Conceding that in 1864 Congress may not have had a definite idea with respect to the scope of the word "mineral," it is clear that in 1884, when the line of this road was definitely located, it had come to be understood as including all lands containing "valuable mineral deposits," as well as lands "chiefly valuable for stone," and that when the grant of 1864 first attached to particular lands by the definite location of the road in 1884, the railway found itself confronted with the fact that the word "mineral" had by successive declarations of Congress been extended to include all valuable mineral deposits. As no vested rights had been acquired by the Railway Company prior to the definite location of its line, it took the lands in question encumbered by such definitions as Congress had seen fit to impose upon the word "mineral," subsequent to 1864.

Indeed, by the very terms of the granting act of July 2, 1864, not only are mineral lands excluded, but the grant is limited to those lands to which "the United States have full title, not reserved, sold, granted or otherwise appropriated, and free from pre-emption, or other claims or rights, *at the time the line of said road is definitely fixed*, and a plat thereof filed in the office of the Commissioner of the General Land Office." It results from this that if, before the definite location of the road, Congress had withdrawn certain of these lands from the grant, the company was bound by such withdrawal and compelled to accept other lands in lieu thereof within the indemnity limits of the grant.

In construing this grant we must not overlook the general principle announced in many cases in this court, that grants from the sovereign

should receive a strict construction—a construction which shall support the claim of the government rather than that of the individual. Nothing passes by implication, and unless the language of the grant be clear and explicit as to the property conveyed, that construction will be adopted which favors the sovereign rather than the grantee.

The rulings of the Land Department, to which we are to look for the contemporaneous construction of these statutes, have been subject to very little fluctuation, and almost uniformly, particularly of late years, have lent strong support to the theory of the patentee, that the words "valuable mineral deposits" should be construed as including all lands chiefly valuable for other than agricultural purposes, and particularly as including non-metallic substances, among which are held to be alum, asphaltum, borax, guano, diamonds, gypsum, reslin, marble, mica, slate, amber, petroleum, limestone, building stone and coal. The cases are far too numerous for citation, and there is practically no conflict in them.

The decisions of the State courts have also favored the same interpretation. Thus in *Gibson* v. *Tyson*, (5 Watts. 3,) chromate of iron was held to be included in a reservation of all minerals. In *Hartwell* v. *Camman*, (10 N. J. Eq. 128,) a grant of "all mines, minerals open or to be opened," was held to include paint stone, on the ground that it was valuable for its mineral properties—the court distinctly repudiating the idea that the term should be confined to metals or metallic ores. In *Funk* v. *Halderman*, (53 Penn. St. 229,) and in *Gill* v. *Weston*, (110 Pa. St. 313,) petroleum was held to be mineral, although the act authorizing the lease of mining lands was passed before petroleum was discovered. See also *Gird* v. *California Oil Company*, (60 Fed. Rep. 531.) The same principle was extended in *W. & C. Natural Gas Company* v. *De Witt*, (130 Pa. 235,) to natural gas, which was said to be a mineral *feræ naturæ*. In *Armstrong* v. *Lake Champlain Granite Company*, (147 N. Y. 95,) a conveyance of "all minerals, *and* ores," was held to include granite subsequently discovered on the premises, though it would not pass under the name of "mineral ores." In *Johnson* v. *Harrington*, (5 Wash. 78,) the Supreme Court of that State thought it would hardly be disputed that stone was a mineral, though it seems inconsistent with the subsequent case, in the same volume, of *Wheeler* v. *Smith*, holding that the term mineral was only intended to embrace deposits of ore.

The rulings of the English courts have, with a possible exception in some earlier cases, adopted the construction that valuable stone passed under the definition of minerals. Said Baron Parke in *The Earl of Rosse* v. *Wainman*, (14 M. & W. 859, 872): "The term 'minerals' [used in an act of Parliament, reserving to the lord all mines and minerals,] though more frequently applied to substances containing metals, in its proper sense includes all fossil bodies or matters dug out of mines; and

Dr. Johnson says that 'all metals are minerals, but all minerals are not metals;' and mines, according to Jacob's Law Dictionary, are 'quarries or places where anything is digged;' and in the year book, 17 Edw. 3, c. 7, 'minerae de pierre' and 'de charbon' are spoken of. Beds of stone, which may be dug by winning or quarrying, are therefore properly minerals, and so we think they must be held to be in the clause in question, bearing in mind that the object of the act was to give the surface for cultivation to the commoners and to leave in the lord what it did not take away for that purpose." This case was followed in *Micklethwait* v. *Winter*, (6 Exchq. 644,) in which the same act of Parliament was held to include stone dug from quarries. In *Midland Ry.* v. *Checkley*, (L. R. 4 Eq. 19,) stone for road making or paving was held to be a mineral, the Master of the Rolls observing: "Stone is, in my opinion, a mineral, and in fact everything except the mere surface which is used for agricultural purposes. Anything beyond that, which is useful for any purpose whatever, whether it is marble, fire clay or the like, comes within the word 'mineral' when there is a reservation of the mines and minerals from a grant of land." In *Midland Ry. Co.* v. *Haunchwood*, (L. R. 20 Chan. Div. 552,) brick clay was held to be a mineral; and in *Hext* v. *Gild*, (L. R. 7 Chan. App. 699,) the House of Lords held that china clay, and "every substance which may be obtained from underneath the surface of the earth for the purpose of profit," was a mineral, "unless there is something in the context or in the nature of the transaction to induce the court to give it a more limited meaning." The same rule was applied in several analogous cases of granite, sandstone, flintstone and in other similar circumstances. *Attorney General* v. *Welsh Granite Co.*, 35 W. R. 617 (granite); *Bell* v. *Wilson*, 2 Drew & S. 395 (sandstone); *Tucker* v. *Linger*, L. R. 8 App. Ca. 508 (flintstone), and a dozen other cases to the same effect.

We do not deem it necessary to attempt an exact definition of the words "mineral lands" as used in the act of July 2, 1864. With our present light upon the subject it might be difficult to do so. It is sufficient to say that we see nothing in that act, or in the legislation of Congress up to the time this road was definitely located, which can be construed as putting a different definition upon these words from that generally accepted by the text writers upon the subject. Indeed, we are of opinion that this legislation consists with, rather than opposes, the overwhelming weight of authority to the effect that mineral lands include not merely metalliferous lands, but all such as are chiefly valuable for their deposits of a mineral character, which are useful in the arts or valuable for purposes of manufacture.

The decree of the Court of Appeals is therefore

Affirmed.

Mr. Justice BREWER and Mr. Justice PECKHAM dissented.